

Kurdish Human Rights Project

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# LEGAL REVIEW

Kurdish Human Rights Project

**KHRP**

Established 1992

(2007) 11 KHRP LR





## **The Kurdish Human Rights Project**

**The Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights of all persons living within the Kurdish regions, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include both Kurdish and non-Kurdish people.**

### **AIMS**

- To promote awareness of the situation of the Kurds in Iran, Iraq, Syria, Turkey and elsewhere
- To bring an end to the violation of the rights of the Kurds in these countries
- To promote the protection of human rights of Kurdish people everywhere

### **METHODS**

- Monitoring legislation and its application
- Conducting investigations and producing reports on the human rights situation of Kurds in Iran, Iraq, Syria, Turkey, and in the countries of the former Soviet Union by, amongst other methods, sending trial observers and engaging in fact-finding missions
- Using such reports to promote awareness of the plight of the Kurds on the part of committees established under human rights treaties to monitor compliance of states
- Using such reports to promote awareness of the plight of the Kurds on the part of the European Parliament, the Parliamentary Assembly of the Council of Europe, national parliamentary bodies and inter-governmental organisations including the United Nations
- Liaison with other independent human rights organisations working in the same field and co-operating with lawyers, journalists and others concerned with human rights
- Assisting individuals with their applications before the European Court of Human Rights
- Offering assistance to indigenous human rights groups and lawyers in the form of advice and training seminars on international human rights mechanisms.

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# Contents

	Page No.
Abbreviations	16
Relevant Articles of the European Convention on Human Rights	17
<b>Section 1: Legal Developments &amp; News</b>	
EU Fundamental Rights Agency opens	21
CPT elects new president	21
New president takes office at the European Court of Human Rights	21
Protocol 14 still not in force	22
Turkey remains top of European Court annual table of violations	22
Spain assumes OSCE chairmanship	22
UN General Assembly adopts Convention against Enforced Disappearances	23
New UN Secretary General takes office	24
UN Security Council adopts Resolution on the Protection of Journalists	24
UN working group reports issued regarding institution-building process	25
UN Human Rights Council elections held	25

UN Convention on the Rights of Persons with Disabilities opens for signature	26
UN conference on Iraqi refugees and internally displaced persons	26
Council of Europe Commissioner for Human Rights and CPT visit Georgia	27
ODIHR visits Azerbaijan	28
UN Special Rapporteurs visit Azerbaijan	28
ODIHR observes Armenian parliamentary elections	29
UN independent experts express concern on Ahwazi Arab trial in Iran	30
The trial and execution of former Iraqi President Saddam Hussein	30
Developments at the Iraqi High Tribunal	31
UNAMI criticises Kurdish authorities over treatment of journalists and detainees	32
UN Special Rapporteur expresses concern over rise of fundamentalist national sentiment in Turkey	32

## Section 2: Articles

- Tolerating Torture – a Critique of the Court’s Interpretation of Article 3 of the European Convention on Human Rights** 35  
*John Cooper - Barrister, 25 Bedford Row, London; member of the Bar Council’s Human Rights Committee*
- Guarding the Gates to Justice: The ECJ and Terrorism** 59  
*Ed Grieves - Barrister, Garden Court Chambers; KHRP Board and Legal Team Member; member of the Bar Human Rights Committee*
- Negating Pluralist Democracy: the Court Forgets the Rights of the Electors** 67  
*Professor Bill Bowring - Barrister, Gray’s Inn; School of Law, Birkbeck, University of London; member of KHRP Legal Advisory Board*
- Protecting the Rights of Kurdish Women: The Legal Framework and Access to Justice in Turkey and Iraq** 97  
*Zozan Özgökçe, Chnoor Ali Hama Amin and Morten Thorsted - Chair of Van Kadın Derneği (Van Women’s Association – VAKAD); KHRP Fellow; KHRP Resource and Development Consultant*

## Section 3: Case Summaries and Commentaries

### A. ECHR Case News: Admissibility Decisions and Communicated Cases

Category	Names of the Parties	Procedural Status	Page
Right to life	<i>Bayram v. Turkey</i> (75535/01)	Communicated	119
	<i>Giuliani v. Italy</i> (23458/02)	Admissibility Decision	122
Prohibition of torture or inhuman & degrading treatment	<i>Harutyunyan v. Armenia</i> (34334/04)	Partial Admissibility Decision	124

	<i>Sabanchiyeva v. Russia</i> (38450/05)	Communicated	128
	<i>Ismoilov and Others v. Russia</i> (2974/06)	Communicated	129
<b>Right of assembly &amp; association</b>	<i>Artyomov v. Russia</i> (17582/05)	Admissibility Decision	132
	<i>Öcalan v. Turkey</i> (24069/03, 197/04, 6201/06, 10464/07)	Communicated	134

## B. Substantive ECHR Cases

<b>Right to life</b>	<i>Paşa and Erkan Erol v. Turkey</i> (51358/99)		137
	<i>Tarariyeva v. Russia</i> (4353/03)		140
	<i>Anter and Others v. Turkey</i> (55983/00)		145
	<i>Akpınar and Altun v. Turkey</i> (56760/00)		148
	<i>Baysayeva v. Russia</i> (74237/01)		152
<b>Prohibition of torture or inhuman &amp; degrading treatment</b>	<i>Salah Sheekh v. the Netherlands</i> (1948/04)		158
	<i>Rashid v. Bulgaria</i> (47905/99)		162
	<i>Veli Tosun v. Turkey</i> (62312/00)		166
	<i>Zeynep Özcan v. Turkey</i> (45906/99)		169
	<i>Hacı Özen v Turkey</i> (46286/99)		171
	<i>Erdoğan Yağız v. Turkey</i> (27473/02)		175

	<i>Pruneanu v. Moldova</i> (6888/03)	178
	<i>Sheydayev v. Russia</i> (65859/01)	183
	<i>Alsayed Allaham v. Greece</i> (25771/03)	185
Right to liberty and security	<i>Chitayev and Chitayev v. Russia</i> (59334/00)	188
Right to a fair trial	<i>Türkmen v. Turkey</i> (43124/98)	194
	<i>Markovic and Others v. Italy</i> (1398/03)	197
Private & family life	<i>Igor Dmitrijevs v. Latvia</i> (61638/00)	199
Freedom of thought, conscience and religion	<i>Ivanova v. Bulgaria</i> (52435/99)	205
Freedom of expression	<i>Karman v. Russia</i> (29372/02)	208
Freedom of assembly and association	<i>Linkov v. Czech Republic</i> (10504/03)	211
	<i>Ramazanova and Others v. Azerbaijan</i> (44363/02)	214
	<i>Mkrtchyan v. Armenia</i> (6562/03)	218

<b>Right to an effective remedy</b>	<i>Aksakal v. Turkey</i> (37850/97)	221
<b>Protection of property</b>	<i>Fener Rum Erkek Lisesi Vakfi v. Turkey</i> (34478/97)	225
	<i>Xenides-Arestis v. Turkey</i> (just satisfaction only) (46347/99)	228
<b>Freedom of movement</b>	<i>Sissanis v. Romania</i> (23468/02)	231
<b>Freedom of elections</b>	<i>Russian Conservative Party of Entrepreneurs v. Russia</i> (55066/00)	235
	<i>Yumak and Sadak v. Turkey</i> (10226/03)	239
	<i>Kavakçı, v. Turkey</i> (71907/01)	241
<b>C. UN Cases</b>		
<b>Prohibition of torture</b>	<i>A. H. v. Sweden</i> (265/2005)	244
<b>Freedom of association</b>	<i>Boris Zvozkov et al. v. Belarus</i> (1039/2001)	247
<b>Right to vote &amp; to be elected</b>	<i>Leonid Sinitin v. Belarus</i> (1047/2002)	249
<b>Freedom of thought, conscience &amp; religion</b>	<i>Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea</i> (1321/2004 and 1322/2004)	252

## Section 4: Appendices

### Appendix 1

European Court of Human Rights – Composition of the Court as at May 2007	257
--	-----

**Appendix 2**

Extracts from European Court of Human Rights Survey of Activities 2006: Judgments, by Respondent State	258
---	-----

**Appendix 3**

International Convention for the Protection of All Persons from Enforced Disappearance	261
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Publications List	283
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## Abbreviations

CAT	United Nations Committee against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
<b>The Convention</b>	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	The European Court of Human Rights
<b>The Court</b>	The European Court of Human Rights
ECJ	The European Court of Justice
CPT	The Council of Europe's Committee for the Prevention of Torture
DEP	The Democracy Party (Turkey)
HADEP	The People's Democracy Party (Turkey)
ICJ	International Court of Justice
İHD	Human Rights Association, Turkey
NGO	Non-Governmental Organisation
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organisation for Security and Co-operation in Europe
PKK	Kurdistan Workers' Party
UN	United Nations

**Relevant Articles of the European Convention on Human Rights**

Article 2:	Right to life
Article 3:	Prohibition of torture and ill-treatment
Article 5:	Right to liberty and security
Article 6:	Right to a fair trial
Article 7:	No punishment without law
Article 8:	Right to respect for private and family life
Article 9:	Freedom of thought, conscience and religion
Article 10:	Freedom of expression
Article 11:	Freedom of assembly and association
Article 13:	Right to an effective remedy
Article 14:	Prohibition of discrimination
Article 17:	Prohibition of abuse of rights
Article 18:	Restrictions under the Convention to only be applied for prescribed purposes
Article 34:	Application by individual, non-governmental organisations or groups of individuals (formerly Article 25)
Article 41:	Just satisfaction to the injured party in the event of a breach of the Convention
Article 43:	Referral to the Grand Chamber

**Protocol No. 1 to the Convention**

Article 1:	Protection of property
Article 2:	Right to education
Article 3:	Right to free elections

**Protocol No 2 to the Convention**

Article 7:	Right of appeal in criminal matters
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## Section 1: Legal Developments & News



## EU Fundamental Rights Agency Opens

On 1 March 2007, the European Union launched its new Fundamental Rights Agency in Vienna. The Agency will serve as a key resource within the European Community to advise internal institutions and Member States, raise public awareness through collaboration with civil society, and provide information and data to support fundamental rights work. It replaces and builds on the work of the European Monitoring Centre on Racism and Xenophobia. The development reflects the growing desire amongst EU citizens for increased EU level decision making in promoting and protecting fundamental rights. While the Agency awaits the institutional adoption of the Multi-Annual Framework defining its precise work areas and the appointment of a Director, it will focus its work on combating racism, xenophobia and related intolerance.

## CPT elects new president

In March 2007 the Council of Europe's CPT elected Mauro Palma, an Italian specialist on prison issues, as its new President. Mr Palma replaces Silvia Casale, who leaves the position following her election as Chairperson for the new United Nations subcommittee on Prevention of Torture. In his opening words, Mr Palma reaffirmed the CPT's commitment to combating violence against women. He highlighted in particular the plight and vulnerability of women in detention, stating the need for specific safeguards to provide them with the greatest protection.

## New president takes office at European Court of Human Rights

The new President of the European Court of Human Rights, Mr Jean-Paul Costa, who was elected in November 2006, began his new duties on 19 January 2007, the official opening of the judicial year. Mr Costa replaces Luzius Wildhaber who, upon reaching the compulsory retirement age, has had to step down. Mr Costa was previously Vice President of the Court, a position in which he will be replaced by Sir Nicolas Bratza, who since 1 November 2001 has been Section President, Section IV. A detailed list of the current composition of the Court is set out at Appendix 1.

## Protocol 14 still not in force

Despite hopes that the long-awaited Protocol 14 to the Convention would be in force by the beginning of 2007, it still remains unsigned by all Council of Europe member states. To take effect the Protocol must be ratified by all forty-six States that have ratified the Convention. To date only Russia has failed to do so. In January 2007, the newly appointed President, Mr Costa, stressed the importance of bringing Protocol 14 into force, stating that the future of the Court and Convention system will otherwise be in jeopardy, with the influx of inadmissible and repetitive cases threatening to suffocate 'our great European institution.'

## Turkey remains at top of European Court annual table of violations

In the report published by the Court of its 2006 activities, Turkey once again had the highest number of judgments against it, with 354 out of a total of 1,560 judgments issued within the calendar year. This figure accounts for over 20 per cent of the total number of judgments made in 2006. In addition, 362 new cases against Turkey were also found admissible by the Court last year. These figures reflect an astonishing slowdown in the reform process in Turkey, with renewed violence in the Southeast and true regression in the area of freedom of expression. Conversely, states such as Andorra, Armenia, Iceland, Ireland, Monaco and San Marino saw the year pass with neither judgments against them, nor the admission of new cases. Relevant extracts of the report can be found at Appendix 2.

## Spain assumes OSCE chairmanship

On 1 January 2007, Spain took over the 12-month chairmanship of the Organisation for Security and Co-operation in Europe from Belgium, appointing Miguel Angel Moratinos as Chairman-in-Office. On his succession, Minister Moratinos pledged to focus on consolidating and deepening democratic principles and values during his chairmanship. He identified the organisation's priorities for 2007 as the fight against terrorism, protecting the environment, encouraging participation in pluralistic societies and strengthening the OSCE's role as a forum for dialogue and co-operation. He emphasised the need to enhance legal co-

operation, strengthen travel document security and to promote the protection and recognition of victims of terrorism. In relation to the environment, he spoke of the OSCE's strong role in providing for environmental security, asserting that the Spanish chairmanship would work towards increasing recognition of the problems of land degradation and soil contamination as serious security threats. Minister Moratinos also recognised the challenges posed by the 'frozen conflicts' of Georgia, Moldova and Nagorno-Karabakh, adding that the OSCE would focus on building relations between communities and peoples on all sides of the conflicts.

## UN General Assembly adopts Convention against Enforced Disappearances

On 20 December 2006, the UN General Assembly adopted the International Convention for the Protection of All Persons from Enforced Disappearances. Protecting the right of persons not to be subjected to such treatment, the Convention officially opened for signature at a ceremony in Paris on 6 February 2007. Fifty-seven states signed the Convention on the opening day, including 18 African states, 19 European states, 11 Latin American states and 6 states in the Asia-Pacific region. It will however only enter into force after it is ratified by 20 States. Ratification is likely to take longer than usual as it requires ratifying States to alter their national laws so that they incorporate the treaty provisions.

The first ever international autonomous treaty on disappearances, the Convention establishes a set of mechanisms at both the national and international levels that will enable State Parties to effectively prevent enforced disappearances. Reflecting the absolute prohibition of torture, the Convention states that, "No one shall be subjected to enforced disappearance." It provides for no exceptions to this right, effectively removing any scope for an 'exceptional circumstances' justification to be put forward by States. Furthermore, the right of *habeas corpus* is also recognised as a non-derogable right, thereby prohibiting secret detentions and the deprivation of liberty in non-officially recognised and supervised places. The Convention goes further in establishing an international framework by requiring all State Parties to ensure that enforced disappearances constitute an offence under domestic law, subject to prosecution and punishment. Significantly, it also establishes the widespread and systematic practice of enforced disappearances as constituting a crime against humanity and thereby subject to international criminal prosecution. The text of the Convention can be found at Appendix 3.

Extending its protection to victims, the new Convention also recognises the rights of victims and their families to truth, justice and reparation for injuries. State authorities are thereby required to present such persons with an explanation of the circumstances of an enforced disappearance and also the fate of the disappeared person. The Convention's monitoring body will be entitled to receive requests for urgent action on individual cases, to conduct visits with the agreement of State Parties concerned, and, to urgently bring any suspected crimes against humanity (in this context) to the urgent attention of the UN General Assembly.

## **New UN Secretary General takes office**

On 2 January 2007, Ban Ki-Moon, former Republic of Korea Foreign Minister, took over formally as the Secretary-General of the UN. Pledging to be a harmoniser and bridge builder who would restore trust in the UN, he called for collective action in addressing various international crises including the situation in Sudan. He also singled out as a priority the strengthening of the rule of law within the international community.

## **UN Security Council adopts Resolution on the Protection of Journalists**

In 23 December 2006 the UN Security Council adopted Resolution 1738 on the protection of civilians in armed conflict. Introduced by France and Greece, the unanimously adopted resolution condemns attacks taken against journalists in conflict areas. It reaffirms the fundamental principles of press freedom and the necessity of preventing violence against journalists by measures including the prosecution of those responsible for such crimes. The resolution also reaffirmed condemnation of all incitements to violence.

## UN working group reports issued regarding institution-building process

On 15 March 2007, the UN Human Rights Council discussed the reports of the Working Groups on the Universal Periodic Report and Special Procedures. Highlights from the discussion include the opinion of the Working Group on the Complaints Mechanism that any reform should ensure that the mechanism is impartial, objective, effective, victim-orientated and timely, ensuring full transparency and accountability. Adding to this, the Working Group on the Agenda reaffirmed the need to seek a balance between all rights – economic, social and cultural, as well as political and civil rights; while at the same time striking a balance between the views of developing and developed nations. The Human Rights Council is expected to adopt resolutions defining all institution-building elements in its Fifth Session which will take place from 11 – 18 June 2007.

## UN Human Rights Council elections held

On 17 May 2007 elections were held to replace fourteen of the founding members of the UN Human Rights Council. The elections were to fill member seats expiring this year, and candidates included both returning Member States and new members from the region. In accordance with the procedural rules for elections laid out by General Assembly Resolution 60/251, new members were ‘elected directly and individually by secret ballot by the majority of the members of the General Assembly.’ Outgoing African States Algeria, Morocco, and Tunisia were replaced by Madagascar, Angola and Egypt, while South Africa’s term was renewed. In the Asian region, India, Indonesia and the Philippines successfully renewed their membership terms, while Bahrain was replaced by Qatar. In Western Europe the Netherlands was re-elected, and, after an initial tie, Italy topped Denmark in a second round of voting to win the second membership seat. Outgoing member Slovenia was re-elected and, after two rounds of voting, was joined by Bosnia and Herzegovina to occupy the two Eastern European membership seats. The Latin American and Caribbean States greeted new members Nicaragua and Bolivia as Argentina and Ecuador’s membership terms expired.

## UN Convention on the Rights of Persons with Disabilities opens for signature

On 30 March 2007 the UN Convention on the Rights of Persons with Disabilities and its Optional Protocol opened for signature, having been adopted on 13 December 2006 by the General Assembly. There were 82 signatories to the Convention, 44 signatories to the Optional Protocol, and one ratification of the Convention, the highest number of signatories in history to a UN Convention on its opening day. To come into force it will however require 20 ratifications, something widely believed to be attainable within a year.

The Convention is the first human rights convention to be open for signature by regional integration organisations. Seeking to protect the world's 650 million persons with disabilities, the Convention ensures that these people enjoy the same opportunities in society that everybody already enjoys. It obliges States to make adjustments to meet the needs of persons with disabilities and clarifies how this can be ensured through the establishment of specific rights such as the right to make decisions on personal and legal matters. Additionally, the Optional Protocol allows individuals and groups to take complaints to the UN Committee on the Rights of Persons with Disabilities, once all national recourse procedures have been exhausted.

## UN conference on Iraqi refugees and internally displaced persons

The International Conference on Addressing the Humanitarian Needs of Refugees and Internally Displaced Persons (IDPs) inside Iraq and in Neighbouring Countries was held in Geneva from 17 – 28 April 2007. The conference had four primary conclusions. The first was the renewed commitment of the Government of Iraq to support Iraqis outside the country, with not only financial assistance but also cooperation with the host countries with regards to health and education systems. The second was the adoption by the UN of its strategic platform for humanitarian action inside Iraq. The third important result was the continued support of host countries, not only in the region but further away, to go on granting protection and assistance to the Iraqi communities. Finally, there was unanimous recognition of the generosity of the host nations, especially Syria and Jordan, and the clear commitment for financial burden sharing.

Addressing the media at the close of the Conference, Antonio Guterres, the UN High Commissioner for Refugees, recognised that conditions of security in Iraq were not met 'for the people to return voluntarily and in safety and dignity.' He also reminded all parties of the importance of not forcing people back to Iraq against their will. Commenting on the general situation in Iraq, he stressed the importance of preventing apartheid or social disintegration within the wider community. He emphasised the need to prevent displacement while simultaneously supporting all forms of return that would allow a multi-religious, multi-cultural, and multi-ethnic society to be fully re-established.

## Council of Europe Commissioner for Human Rights and CPT visit Georgia

In February 2007, Thomas Hammarberg, the Council of Europe's Commissioner for Human Rights visited Georgia. The Commissioner met with high ranking government officials and representatives of civil society to investigate the human rights situation and the frozen conflicts relating to Abkhazia and South Ossetia. He visited accommodation centres for internally displaced persons, prisons, hospitals and schools; discussing issues surrounding the protection of minorities, the availability of education, and the treatment of arrested and detained people. In Abkhazia, the Commissioner welcomed the release of Levan Mamasakhlisi who had been detained for five years, stating that his release will demonstrate how positive steps taken in defence of human rights contribute to confidence building, an imperative for peaceful resolution of conflict. The visit is to be followed up by a report to the Georgian authorities containing specific recommendations about how to improve the human rights situation.

In addition, a delegation of the Council of Europe's Committee for the Prevention of Torture carried out a two-week visit to Georgia at the end of March 2007. This was the CPT's third periodic visit to the country, during which the delegation met with senior government officials and members of civil society organisations and assessed the progress regarding the treatment of persons detained by the police and the practical operation of the safeguards in place. Particular attention was paid to the treatment of remand prisoners in Tbilisi and Zugindi. The situation in psychiatric establishments and the new legal safeguards applicable to involuntary psychiatric patients were also examined. The trip also marked the first ever visit to a special school for juvenile delinquents.

## ODIHR visits Azerbaijan

In December 2006, ODIHR Director Ambassador Christian Strohal made a two-day visit to Azerbaijan. The focus of his visit was the strengthening of co-operation between Azerbaijan and ODIHR on democratisation and human rights related issues. During his visit, he met with the President, Foreign Minister, a number of senior officials as well as representatives of political parties and civil society. The Ambassador called on Azerbaijan's leaders to implement recommendations made by the ODIHR after the 2005 parliamentary elections, as well as others made by the Office and Venice Commission of the Council of Europe. He also discussed ways of improving the human rights situations in centres of detention, specifically through a monitoring mechanism to investigate alleged police abuses, and by ensuring the freedom of the media.

## UN Special Rapporteurs visit Azerbaijan

April 2007 saw two high level visits by UN representatives to Azerbaijan. The first by the Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons (IDPs), Walter Kälin, took place from 2 to 6 April 2007. His visit included trips to Baku, Sumgayit, Bilasuvar, Imishli and Sabirabad; and meetings with IDPs, Government officials, international agencies and key members of civil society. Reflecting the views of many of the IDPs with whom he personally spoke, Mr Kälin identified the country's primary challenge as being the creation of livelihoods for the displaced population. He encouraged the Government and the international community to continue striving for the resolution of the Nagorno-Karabakh conflict, stating that the eventual return of those wishing to go back, and the immediate improvement of their living conditions in displacement, are not mutually exclusive.

From 22 to 28 April 2007, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Ambeyi Ligabo, also visited Azerbaijan. The primary purpose of his trip was to assess the current situation of freedom of opinion and expression as reflected in the Universal Declaration of Human Rights and the International Pact on Civil and Political Rights. Mr Ligabo gathered information about people who had experienced pressure in their expression of this right, in particular specialists in the sphere of information. Azerbaijan continues to impose criminal sanctions on individuals found guilty of libel or defamation, instead of dealing with such instances under

civil law as per accepted international practice. Mr Ligabo is expected to prepare and deliver a comprehensive report on his findings to the UN Human Rights Council in due course.

## ODIHR observes Armenian parliamentary elections

On March 19, 2007, ODIHR opened an election observation mission in Armenia at the invitation of the Armenian Foreign Ministry. The mission consisted of 13 experts based in Yerevan, which is home to half the Armenian electorate, and 29 other long-term observers deployed throughout the country. The mission focused on the parliamentary elections held on 12 May 2007. Four past OSCE/ODHIR reports on Armenian elections, including one relating to the 2003 elections, had all assessed the elections as falling short of OSCE commitments and other international standards for democratic elections, making this observation a crucial test for Armenia. The mission published its Post-election Interim Report on 24 May 2007, which evaluated the elections on their compliance with the principles of democratic electoral processes and national legislation. Although the preliminary report found that Armenia's May 2007 elections 'demonstrated improvement' and were 'conducted largely in accordance with OSCE and Council of Europe commitments and other international standards for democratic elections,' this final report found dramatically otherwise.

It first noted that The Armenian authorities' last-minute denial of visas to OSCE/ODIHR observers seconded by one OSCE participating State (Turkey) was not in line with the commitment in the 1990 OSCE Copenhagen document to invite election observers from any other OSCE participating State. The mission then concluded that the elections failed to fully meet international standards, highlighting allegations of vote buying, voter fraud and result falsification as well as significant problems with the transparency of the tabulation process. While unofficial results indicate that three parties supporting President Robert Kocharyan have so far gained more than 53 per cent of the vote, three of the nine election committee members representing minority parties refused to sign the results protocol on the grounds that the extent of electoral violations reported to them called into question the accuracy of the announced outcome. As of this writing, at least one complaint has been received by the Constitutional Court challenging the majoritarian election results in one of the Territorial Election Commissions. The Constitutional Court has one month to render a final decision on this and any other majoritarian disputes which may arise from the elections.

## UN independent experts express concern on Ahwazi Arab trial in Iran

On 10 January 2007 three UN Human Rights Council Special Rapporteurs urged the Iranian Government to stall the imminent execution of seven men belonging to the Ahwazi Arab minority, and requested that the Government retry the seven men in a fair and public hearing. The Rapporteurs on extrajudicial, summary or arbitrary executions; independence of judges and lawyers; and torture, were deeply concerned by the circumstances surrounding the trial and subsequent sentencing of the seven men. Their trial was carried out in secret, before a court in the Western Iranian province of Khuzestan. Forbidden access to lawyers before the trial, the prosecution case was also only disclosed to them hours before the trial began. There have also been widespread reports of lawyer intimidation and confessions being obtained under torture.

Arrested as part of a larger group of activists, the seven men were charged with many serious offences that included the attempted overthrow of the Government. It is the charge of '*mohareb*', which triggers an automatic death sentence, that has however caused observers the greatest concern. Many believe its terms too vague to satisfy the strict standards of legality set by international human rights law for the imposition and execution of the death penalty. Ignoring repeated requests by the Special Rapporteurs to address these reports, the Iranian Government instead executed three of the ten men originally convicted in mid-December. In its systematic refusal to provide information and engage with the Rapporteurs, Iran is in clear violation of their obligations under the procedures of the Human Rights Council.

## The trial and execution of former Iraqi President Saddam Hussein

On 30 December 2006 former Iraqi President Saddam Hussein was executed by hanging, following the decision of the Appeal Court four days earlier to uphold his sentence and conviction by the Iraqi High Tribunal for the killing of 148 men and boys in 1982. Widely regarded as a highly flawed trial process, international observers believe the trial was undermined from the outset by Iraqi Government interference. Key human rights violations include the regular failure to disclose key evidence, a hasty appeals process and intimidation of the defence, which

ultimately led to the death of three defence lawyers and the resignation of the presiding judge. The right not to be subjected to cruel, inhuman or degrading punishment was also egregiously violated when Saddam Hussein was mocked by his executioners before his hanging, a video of which was later circulated. These events have caused great unease within the international human rights community, with many observers concerned at their implications for the future of human rights and the rule of law in Iraq.

## Developments at the Iraqi High Tribunal

Former Iraqi Vice-President Taha Yassin Ramadan was executed by hanging on 20 March 2007. Found guilty by the Tribunal of crimes against humanity, Ramadan had initially been sentenced to life imprisonment. The conviction was upheld by the Appeals Chamber on 26 December 2006, who returned the case to the Trial Chamber urging an imposition of the death penalty. Ramadan's execution follows that of both Barzan Ibrahim al-Tikriti and Awad Hamad al-Bandar al-Sadun, Saddam's co-defendants. The executions ignored international pleas, led by the UN High Commissioner for Human Rights Louise Arbour, to stay the executions, stating that given the circumstances they would be grievous violations of Iraq's international human rights obligations. Like the trial of Saddam Hussein, these subsequent trials too indicated a failure by the Tribunal to protect fundamental fair trial guarantees. In particular, Ramadan was convicted without any evidence having been presented that linked him to the crimes with which he was charged.

On 2 April 2007, an Iraqi prosecutor asked for the death penalty to be imposed on Ali Hassan al-Majid, also known as 'Chemical Ali' and four other regime officials. The five men are facing charges of crimes against humanity for incidents which occurred during the crackdown in the 1980s on Kurds in Iraq that resulted in the death of 180,000 people.

## UNAMI criticises Kurdish authorities over treatment of journalists and detainees

In its 10<sup>th</sup> human rights report on Iraq, the UN Assistance Mission in Iraq raised concerns over infringements of freedom of expression by the regional government. Although acknowledging the stable security situation, it noted abuses in other areas. The report stated that authorities continue to subject journalists to harassment, arrest and legal actions for reporting on government corruption, poor public services or other issues of public interest. It also criticised Kurdish security forces, finding that hundreds of detainees had been held for prolonged periods without charge or due process. The majority had been arrested on suspicion of involvement in terrorism and other serious crimes, with many accused or being supporters of Islamist groups. Further, the mission had received allegations of the torture and ill-treatment of detainees.

## UN Special Rapporteur expresses concern over rise of fundamentalist national sentiment in Turkey

On 23 January 2007 Ambeyi Ligabo, Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, issued a statement expressing concern over the murder of respected journalist Hrant Dink in Turkey. In his statement he identified an 'extreme polarisation of views and perverted sense of national identity' as having caused the tragic event. The murder of Mr Dink comes at a time when there is great general concern in Turkey over the recent rise in fundamentalist national sentiment, which has grave implications for the protection of minorities and freedom of expression in the country. The increasing trend of gruesome murders of journalists in Turkey is a worrying sign of the deterioration of the protection of civil rights, something which will inhibit tolerant and open public debate.

## Section 2: Articles

**The opinions expressed in the following articles are those of the authors and do not necessarily represent the view of KHRP.**



John Cooper<sup>1</sup>

## Tolerating Torture – a Critique of the Court’s Interpretation of Article 3 of the European Convention on Human Rights <sup>2</sup>

### Abstract

*This article considers the role of Article 3 of the European Convention on Human Rights and suggests that the inviolate protection that it purports to offer has been eroded by inconsistent and reticent application of the minimum severity threshold criteria. In particular, it is suggested that in the spirit of maintaining torture as the ‘gold standard’ of human abuse, what should properly be categorised and chastised as torturous conduct has been downgraded into the lesser provisions of the Article: inhuman or degrading treatment and/or punishment.*

*It suggests that far from being too broad a stricture, Article 3 is artificially and immorally constrained. The article seeks to elucidate this contention with particular reference to Article 3’s approach to capital and corporal punishment. By means of a comparison with the duplicitous attempts of interested States to define and yet redefine the definition of ‘War’, it is contended that a similar restricted definition of convenience is in the process of being applied to ‘Torture’. The article concludes that it is morally unacceptable to undermine and devalue the fundamental standards of human behaviour.*

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- 2 A version of this article first appeared in University College London’s *Jurisprudence Review*, Issue 1 (2007). The author is grateful to Lord Hope of Craighead for his encouragement in the writing of the article. The views expressed in it, are, of course, the author’s and the author’s alone.

## Introduction

The Article 3 prohibition of torture, inhuman and degrading treatment or punishment must, along with the right to life, be the most inviolate protection provided by the European Convention on Human Rights. It prohibits in absolute terms torture, or inhuman or degrading treatment or punishment.<sup>3</sup> It is indeed one of the most categorical of Convention guarantees, providing a minimum standard with which a state must comply. Lord Cooke of Thorndon in his dissenting judgement in *Higgs -v- Minister of National Security*<sup>4</sup> articulated the critical state of Article 3:

Self-evidently, every human being has a natural right not to be subjected to inhuman treatment. A right inherent in the concept of civilisation ... a duty of governments and courts in every civilised state must be to exercise vigilance to guard against violation of this fundamental right. Whenever violation is in issue, a court will not fulfil its function without a careful examination of the facts of each individual case and the global assessment of the treatment in question. Commonly, decisions in this field are findings of fact and degree, not expressions of law. It more than the assessment is open, [*sic*] the choice made is not one of law or legal principle but one of evaluation. Although it may properly have some influence on a later court faced with somewhat similar facts and anxious to achieve consistency of results, it cannot be a binding precedent. To subscribe to a contrary doctrine of precedent would be to insist on “the austerity of tabulated legalism”. If I venture to state these dogmatically, it is only because they seem dictated by the very idea of civilisation.

The terms “torture”, “inhuman” and “degrading treatment or punishment” are often considered to be placed in a hierarchy. Firstly, torture as the most severe: followed by inhuman treatment or punishment and then degrading treatment or punishment.

The European Committee for the Prevention of Torture takes a somewhat different view and seems unwilling to produce a clear and comprehensive interpretation of the terms. Their approach is that the expressions “torture”, “inhuman” and “degrading treatment” or “punishment” reflect not so much a hierarchy of

3 See *Ireland -v- UK* (1978) 2 EHRR 25, 79, para. 163; *Selcuk & Asker -v- Turkey* (1998) 26 EHRR 477, 515, para. 75.

4 [2000] 2 AC 288.

severity of ill-treatment as different types of ill-treatment, more or less closely linked.<sup>5</sup> This is analogous to the UN approach of a 'global' interpretation of ill-treatment, for which this paper contends.

European jurisprudence seems to make it clear that the European Court of Human Rights is more willing to find inhuman treatment than torture. Therein lies the fundamental iniquity. The intensity of the suffering required to constitute inhuman treatment is less, and consequently the condemnation weaker. One cannot help but postulate that the European Court is in some way attempting to maintain a perverse gold standard when assessing the infliction of suffering, human upon human. In setting the threshold, this paper argues that what should be properly categorised as torture is artificially mitigated so as to maintain the high impact effect when a court does rule that torture has occurred.

Whilst one can appreciate that if the standard is set too low, there may be a risk that protections offered by Article 3 will be devalued; nevertheless, the impact of Article 3 torture is undermined by artificially raising the threshold in such a way that a finding is the exception rather than the rule. Implicit in the unstructured way in which the threshold varies from case to case, decade to decade, abuse to abuse, is the assumption that methods of torture and ill-treatment change over time and that the Courts must adapt to those developments.

This paper does not accept this basic standpoint. It is not the severity of ill-treatment which is changing; it is society's moral attitude to the abuse, as interpreted by the courts. This interpretation inherently contains significant elements of subjectivity or relativity. This 'dumbing down' process is a morally repugnant approach to protecting one of our most fundamental freedoms. There are those who argue that the ambit of Article 3 is too broad, too ill-defined. Indeed, countries such as America continue to agitate for a conclusive and limited definition of torture. It will be suggested that this is not to strive for clarity to avoid physical transgression, but to assist in legal and semantic argument to extricate behaviour from proscription, once carried out. Torture does not need a complex definition - when you see it, you know it.

Further, capital and corporal punishment should be prohibited under Article 3. Whilst some aspects of corporal punishment are proscribed, others are not, interpretation depending in some cases as to whether the weapon of choice

5 See Evans & Morgan, *Preventing Torture* (June 27, 2000) at 253-256.

is a cane or a rubber-soled gym shoe. The death penalty presents the starkest of betrayals of Article 3, which I argue should be in violation of the torture prohibition.

There is a dangerous trend, prevalent in the ongoing debates of definition, to interpret behaviour which prima facie transgresses Article 3 as simply ill-treatment, or sometimes even entirely out of the ambit of the Convention. The so-called “ticking time bombers”, who, if they were to speak candidly, would condone ill-treatment in defined circumstances, are intellectually squeamish. Let them say so plainly, and not insidiously erode Article 3 from within.

## Definitions

What then are the differences between the three categories of “torture”, “inhuman treatment” and “degrading treatment”?

### *Torture*

Torture is defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984<sup>6</sup> as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third party has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>7</sup>

In the Greek case<sup>8</sup>, the Commission considered allegations of ill-treatment and torture in Greek prisons which seemed, in many instances, to be carried out as a matter of routine. They defined the word torture as an aggravated form of inhuman treatment which had a purpose such as the obtaining of information or confession, or the infliction of punishment.

6 Adopted and opened for signature, ratification and excision by General Assembly Resolution 39/46 of 10 December 1984.

7 See also the International Covenant on Civil & Political Rights 1966, Article 7.

8 (1978) 2 EHRR 25.

### ***Inhuman Treatment and/or Punishment***

Inhuman treatment and/or punishment involve causing “intense physical and mental suffering”.<sup>9</sup> The treatment can fall short of actual bodily injury but can include “acute psychiatric disturbances”.<sup>10</sup> The distinction between torture and inhuman treatment and/or punishment centres on the degree of suffering caused by the alleged ill-treatment. The minimum severity threshold applies in matters of inhuman treatment and/or punishment as with any other aspect of Article 3’s application.

### ***Degrading Treatment and/or Punishment***

Treatment will be deemed to fall within this category of an Article 3 violation if it is adjudged to arouse in the victim the feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance.<sup>11</sup> Again, the distinction embodied in Article 3 between degrading treatment and/or punishment and that of inhuman treatment and/or punishment and torture, derives principally from a difference in the intensity of the suffering inflicted.

Ill-treatment itself will not be degrading unless the person concerned has undergone, in the eyes of others or in his own eyes, humiliation or debasement attaining a minimum level of severity.<sup>12</sup>

### **The Minimum Level of Severity**

In order for conduct to be prohibited, the ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of what constitutes a minimum level of severity is relative and will depend upon all the circumstances of the case, but includes such matters as the duration of the ill-treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. The effect of this stricture has resulted in the Courts developing a boundary, across which every applicant must cross to obtain the protection afforded by Article 3 and more particularly of what division of Article

9 See *Ireland -v- United Kingdom* (1978) 2 EHRR 25 at para. 159.

10 See *Ireland -v- United Kingdom* at para. 159.

11 See *Ireland -v- United Kingdom* at para. 167.

12 The level of humiliation or debasement must be over and above that inherent in legitimate punishment. In *Costello-Roberts -v- United Kingdom* (1995) 19 EHRR 112, the European Court held that a “slipping” administered to a 7 year-old boy at a private school did not reach the minimum level of severity to amount to degrading treatment.

3's definition they may call upon.

Sometimes it is obvious that a violation is extreme. In 1878 the US Supreme Court reassuringly affirmed that, disembowelling alive, beheading, quartering, public dissection and burning alive were cruel.<sup>13</sup> However, sometimes matters are open to the Court's interpretation. In *Z -v- UK*<sup>14</sup>, the Court considered facts which revealed that children were exposed to appalling living conditions which included gross neglect and emotional abuse, however it surprisingly declined to come to a finding of torture. All the more surprising when one considers the facts of this case in a little more detail. In this case, the children were left in unsanitary conditions and subjected to, amongst other things, chronic food shortages. The European Court of Human Rights held that the neglect and abuse suffered by the four child applicants reached the threshold of inhuman and degrading treatment. This, despite what a consultant child psychiatrist referred to as "horrific experiences". If torture constitutes an aggravated form of inhuman and degrading treatment, one can only guess at how much the children's conditions needed to be further depraved to attract torture's 'gold standard'. The Court's attempts to maintain a perverse form of sanctity for torture are a pragmatic if not cynical barometer of societies' devalued moral standards.

One of the earliest cases to develop guidelines was *Ireland -v- UK*<sup>15</sup> which concerned the British government's response to terrorism in Northern Ireland in the late 1970s. The United Kingdom approved "five techniques" of interrogation of terrorist suspects which included wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink. The European Court of Human Rights was asked to adjudicate as to whether these activities breached Article 3. All activities were said to do so but they were not categorised necessarily as torture, bringing the Court into conflict with the Commission.

The Commission unanimously found that the five techniques did constitute a practice of torture. When one analyses the techniques, this may not be surprising. Wall-standing consisted of forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread eagled against the wall with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers". Hooding consists of putting

13 See *Wilkerson -v- Utah* 99 US 130 at 136 (1878).

14 See [2002] 34 EHRR 3.

15 See (1978) 2 EHRR 25.

a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation. Subjection to noise consisted of holding the detainees in a room pending their interrogation where there was a continuous loud and hissing noise. Deprivation of sleep meant that the detainees were deprived of their sleep pending interrogation. Deprivation of food and drink subjected the detainees to a reduced diet during their detention at the interrogation centre and pending their interrogations.

In the judgment of the European Court of Human Rights<sup>16</sup>, the Court's condemnation is clear, yet it still fails to call the techniques torture:

the five techniques were applied in combination, with premeditation and for hours at a stretch; they caused, if not actually bodily harm, at least intense physical and mental suffering to the person subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fell into the category of inhuman treatment within the meaning of Article 3. The techniques were also degrading since they were such as to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance.

As with *Z -v- UK*, the man on the street might well have taken a different view.

Relativity is also an issue for the Court in deciding whether an individual can claim that his treatment at the hands of other individuals is abusive. In *Toomey -v- United Kingdom*<sup>17</sup>, the applicant was recommended for assessment under the Sex Offenders Treatment Programme and transferred to prison where he underwent a penile polygraph assessment (PPG). The first test lasted for one hour and twenty minutes wherein the applicant was put in a small room without windows and with bolts both inside and outside the door. A video recorder was adjusted to the level of his face. The applicant then had to attach a sensor clip to his penis and to leave his underpants and trousers removed throughout the test. The applicant was shown sets of slides which included nude images of young children, scenes of consensual sex, rape and non-sexual violence. The test then continued with a "key score" pad on which the applicant had to mark his sexual attraction to the slides with a score from zero to nine.

16 At paragraph 167.

17 Application No. 37231/97.

In due course, the conclusion of a forensic psychologist was that the applicant presented a low risk of re-offending. He complained to the European Court of a violation of Article 3 arguing that the PPG tests amounted to torture, inhuman or degrading treatment. The Court declared the application inadmissible (by majority). They emphasised that the minimum level of severity was relative depending upon the above-cited circumstances and although they accepted that the applicant's participation in the tests was humiliating for him, the question that had to be decided was whether, given all the relevant circumstances of the case, the PPG assessments amounted to degrading treatment within the meaning of Article 3. The Court did not believe that the treatment could be so categorised.

So, because a man is a *potential* threat to society, protection from what is, *prima facie*, gravely abusive treatment is considered relative to the perceived threat being guarded against. *Toomey*, a forerunner of the "ticking time bomb" argument, clearly gives early notice that Article 3 is capable of an interpretation which will sacrifice the individual for State imperatives, under a cloak of relativity.

### No Defence to Torture

Much is made of the organic nature of the Convention and in particular Article 3. In short, it grows and develops as society changes. This principle was eloquently articulated in the middle of the last century by the US Supreme Court in which it opined that whether a punishment is cruel is to be determined having regard to "the evolving standards of decency that mark the progress of a modern society".<sup>18</sup> The problem with this approach in relation to Article 3 and in particular torture is that those who assess evolving standards, that is the judges, may be unwittingly seduced into thinking that their own moral standards represent the current progress of society. As Scalia J observed in *Thompson -v- Oklahoma*<sup>19</sup>, "the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views". Fluid and unstructured interpretations of the minimum threshold risk neutering legal condemnation of atrocities inflicted upon human beings by their fellows. All too often an interpretation of the threshold is subjective. Subjectivity, like relativity, breeds inconsistency. Moral society demands unequivocal condemnation of human abuse upon human.

If a person deliberately inflicts suffering, be it psychological or physical upon another, then there can be no excuse as to liability. Analogous concepts of

18 See *Trop -v- Dulles* 356 US 86 at 100 and 101 (1958).

19 See (1988) 487 US 815 at 865. See also A Scalia, *A Matter of Interpretation*, Princeton University Press, Princeton 1997, pages 129, 145-147.

criminal law provide defences of duress or self-defence, to acts of violence. None of these can be defences to torture, inhuman or degrading treatment. By definition, such acts are extreme, and extreme responses are not condoned in domestic criminal law. Where a Court can decide upon the level of severity is in sentence. Given that there are no defences as such to torture, inhuman or degrading treatment, any threshold of 'severity' should only be taken into consideration at the sentencing phase. In this model, moral society is served and a balance of judicial response is accommodated. Torture can only be eliminated or at least reduced to an exceptional aberration if the courts and sovereign states are willing to acknowledge it in all its manifestations.

### Why Tolerate Torture?

*Oh, my brothers. I suppose really a lot of the old ultra- violence and crasting was dying out now. The rozzes being so brutal with who they caught, though it had become like a fight between naughty nadsats and the rozzes who could be the more skorry with the nosh and the britva and the stick and even the gun. But what was the matter with me these days was that I didn't like care much.*<sup>20</sup>

The answer to the simple question 'should we tolerate torture?' would, until very recently, have been a resounding 'no'.

Presently there is the 'ticking bomb' debate, where some apologists for torture argue that there may be valid and moral excuse for deliberately inflicting harm on one individual for the sake of the many. It is the essential argument of this paper that there can be no excuse for torture, inhuman or degrading treatment.

An analogy with this position can be taken with society's attitude to violence. Most rational individuals would say that they abhor acts of violence, but then go on to dilute this fundamental statement of moral principle by stating that in some circumstances violence is appropriate, for instance, in lawful self-defence or from a state's perspective, an act of defending the country.

The ultimate Armageddon of this approach was well summed up in Anthony Burgess's notorious *A Clockwork Orange*. What Burgess and later Stanley Kubrick in the seminal film were asking is whether we should tolerate violence. They then graphically reproduced the consequences of such tolerance. The ultra-violent

20 Burgess, Anthony: *A Clockwork Orange*, Penguin Books, 1962

Alex finds himself incarcerated in prison and at the mercy of the ministrations of Dr Brodsky, a government psychologist. Here, Alex who has committed some appalling acts of physical violence including the rape of innocent victims, faces the wrath of government. The governor of the prison tells Alex<sup>21</sup>: “The government cannot be concerned any longer with outmoded ... theories. Cram criminals together and see what happens. You get concentrated criminality, crime in the midst of punishment”. This is the ultimate endgame, within the story of *A Clockwork Orange*. Illegal violence on the street met with legal violence in prison - “crime in the midst of punishment”. It is the consequence of the failure to categorically proscribe violence. Similarly, a failure to condemn torture, inhuman or degrading treatment gives its commission credence. When society condones violence it becomes a violent society; if society tolerates torture, it becomes a place where human dignity is a rebuttable presumption.

It has to be recognised that there is an inalienable right of self-defence, providing that it is proportionate, but that is and can only ever be, the single derivation from a moral and legal proscription of violence. This derogation cannot apply to torture, inhuman and degrading treatment or punishment. The “ticking bomb” excuse for torture must be entirely rejected. Apologists for this dilution of fundamental principles pray that harm to the *one* will save the *many*. But at the very highest, interrogators can only maintain an informed guess as to the value of the detainees’ information and upon that hunch excuse what would otherwise be torture, inhuman or degrading treatment. Therefore, there is no parallel excuse for torture as there is in law for violence.

### **Exposing Torture is not Enough**

Exposing torture does not necessarily lead to opposing it. We have seen the exceptional exposure of the unacceptable behaviour of US armed forces in Abu Ghraib in Iraq, but it is still the case that the United States of America continues to show a reticence for clear and definitive action demonstrating opposition. Indeed, the American government persists in attempting to persuade the international community to formally define torture. Formal definitions inevitably lead to nice distinctions. This attitude dates further back than Iraq, but always seems to be highlighted when a country’s foreign policy tolerates or endorses torture overseas in pursuance of foreign policy objectives. In other words, pacification of a population may entail use of torture.

21 Page 64.

During the United States' and United Nations' joint military and humanitarian intervention in Somalia, a number of cases of torture were reported to the international media and occupying soldiers were brought before military courts and Commissions of Enquiry in the United States, Canada, Belgium and Italy in response to evidence that they tortured Somali detainees.<sup>22</sup> As is pointed out by Bertil von Dunér in his book *An End to Torture*<sup>23</sup>:

the assumption that a government will take another to court because of human rights violations on its territory is embodied in international human rights law, but that body of law lies dormant. In the case of Somalia, there was (still is) no government to protect its population against abuses committed by the domestic, foreign or international military or police. In other cases, there may be a government theoretically willing to take another to court because of a breach of prohibition of torture, but practically incapable of doing so because the price of embarrassing another government may be too high.

In the realm of foreign policy, human rights principles regularly lose out. Denials of human rights are justified by the threat of terrorism. That is not a recent phenomenon, it was well before 9/11 that the United States took a cavalier attitude towards degradation of those detained. During the Cold War, foreign policy objectives were to contain Communism and the end of the Cold War did not lead to the resurgence of respect for human rights. Quite the contrary. In some regimes, torture is not only implicitly justified as part of policies designed to overcome terrorism, it extends into attempts to combat drug trafficking. If it is proportionate or relative to torture or inhumanly treat individuals on a subjective analysis of what is required to combat drug trafficking, where will the concept end? Will it become legitimate to dilute Article 3 proscriptions to affect what law enforcement agencies might conceive as a necessary process to apprehend a serial killer?

### **Terrorism and its Effect on Article 3**

Let us now use as an example the definition of 'terrorism' to exemplify the way in which a State can undermine and subvert the vital protections offered by Article 3. What actually is terrorism? It is simply the creation of fear or foreboding to obtain an objective, particularly through the use of violence.

22 J Hoagland, 'Missteps in Somalia, but Overall the Operation is Encouraging', *International Herald Tribune*, 15 April 1993.

23 Zed Books, 1998.

As Joanna Bourke states in her compelling book *Fear. A Cultural History*<sup>24</sup>:

simply employing the word ‘terrorist’ stimulated fear ... the label ‘terrorism’ was used by governments and other official agencies to incite fears that could then be used to justify speedy and potentially counterproductive military operations. In other words, the word ‘terrorist’ was so frightening in itself that it deflected attention from the serious consideration of foreign policy and incursions into civil liberties at home.

Edward Said put it graphically in his *The Essential Terrorist*.<sup>25</sup> He stated that the expression ‘terrorist’

has spawned uses of language, rhetoric and argument that are frightening in their capacity for mobilising opinion, gaining legitimacy and provoking various sorts of murderous action. And it has imported and canonised an ideology with origins in a distant conflict, which serves the purpose here of institutionalising the denial and avoidance of history. In short, the elevation of terrorism to the status of a national security threat (though more Americans drown in their bathtubs, or are struck by lightning or die in traffic accidents) has deflected careful scrutiny of the government’s domestic and foreign policies.

The use of the word terror has come to describe the immorality of an individual’s actions in the eyes of the state.<sup>26</sup> The term ‘terrorism’ has therefore become increasingly pliable to interpretation and is used by government as a pejorative to condemn individuals, groups or the causes they seek to promote. This enables the State to take a superficially moralistic stance in its dilution of the prohibition of torture, inhuman or degrading treatment or punishment. Emphasis on the terrorist threat has allowed the government in the United Kingdom to introduce proposals to create identity cards, extend detention periods without trial and restrict the free expression of views.

Many believe that western governments have deliberately exaggerated the threat

24 Virago, 2005.

25 1988.

26 See Jorg Freidrichs & Raphael Muturi, *Anything New under the Sun? The Political Struggle behind the Legal Debate on International Terrorism*, Cambridge University Press, 2004, pages 463-471.

of terrorism to curtail legitimate dissent and civil liberties.<sup>27</sup> The inculcation of fear within society has influenced legal decisions with respect to deportation or extradition orders for suspects wanted in developing countries for alleged terrorist offences.<sup>28</sup>

In 2004, the House of Lords questioned the government's authority to detain without trial a non-British terror suspect resident in the UK, Abu Qatada. At the end of 2004, the House of Lords held that Qatada's detention was illegal. Lord Bingham maintained that the government's powers of detention "discriminate on the grounds of nationality or immigration status", and Lord Hoffmann observed that "the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these". Lord Hoffmann went on to state that "fanatical groups do not threaten the life of the nation ... terrorist crime, serious as it is, does not threaten our institutions of government or our existence as a civil community".

Lord Walker who was the single dissenting judge in the House of Lords in the 8-1 judgement in favour of the appellant, articulated the power of a government when it plays the fear card:

It is certainly not the court's function to substitute for the British government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism. When a State is struggling against a public emergency threatening the life of a nation, it would be rendered defenceless if it were required to accomplish everything at once, to furnish from the outset each of its chosen means of action with each of the safeguards.

All too easily then, self-serving definitions, in this case of terrorism, and exaggerated fear of its threat, promote an environment in which the hitherto inviolate safeguards provided by Article 3 can be undermined, not even surreptitiously but with actions bordering on acclamation.

That is not to say that we should put our heads in the sand about any real and sustained threat. But as pointed out by David Martin Jones and M L R Smith in their paper *The Commentariat and Discourse Failure: Language and Atrocity in*

27 See Richard Jackson, *Righting the War on Terror: Language, Politics and Counter-Terrorism*, Manchester University Press, 2005

28 'The Judiciary should not control our borders,' Daily Telegraph, 30 July 2005.

*Cruel Britannia*<sup>29</sup>,

an adequate strategy requires, moreover, a multi-faceted response that goes beyond law enforcement. This does not mean imposing arbitrary regimes of detention without trial. What it does require, however, is enhanced means of intelligence gathering, both technical and human, together with a coherent set of government policies addressing education, welfare, asylum, immigration and culture in order to safeguard a sustainable and civil association.

What it does not require is further erosion of the principles at the heart of Article 3 and carefully thought out by the Universal Declaration of Human Rights, the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, and the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol 11. Unfortunately it seems that the relationship between “law” and “politics,” once considered as unchanging and set in stone is now negotiable, subject to sea-change and qualification in view of altering sets of circumstances. The ultimate fate of Article 3 in the midst of all these uncertainties is that it will become an abstract provision, which will be liable to multiple interpretations.

## War

The concern postulated in this paper that the definition of torture, inhuman and or degrading treatment and punishment is open to multiple and self-serving interpretation is mirrored in the debate as to the definition of “war”. All the pitfalls of the ‘multiple interpretation’ approach can be seen within this arena. As stated by Dino Kritsiotis in his paper *When States use Armed Force*<sup>30</sup>:

Its formulations - according to which states condemned recourse to war for the solution of international controversies and renounced war as an international instrument of national policy - meant that it was a matter of time before the [Kellogg-Briand pact] became chronic entrepot for a haze of competing and often irreconcilable interpretations. “War” of course, carried a range of meanings for a range of different purposes, but it was its technical meaning - wars could only commence and end through the formalities of declarations and peace treaties - which

29 International Affairs, Volume 82, No. 6, November 2006, page 1077 (Chatham House).

30 The Politics of International Law - Cambridge Studies in International Relations, Cambridge University Press, 2004

surfaced in the vagaries of the interpretative practices of states.

Once again, the political process contaminates the operation of pure law. Stripped of its moral foundation what we are left with is a politically acceptable impurity. Through the relentless process of interpretation and qualification, any form of human behaviour, including war and torture, can be justified in legal terms. Martti Koskeniemi put it succinctly in his *From Apology to Utopia*<sup>31</sup> when he wrote "...rules are not automatically applicable. They need interpretation and interpretation seems subjective". If torture and inhuman, degrading treatment or punishment continue to be open to such widespread and inconsistent interpretation, there is a palpable risk that the law will become useless as a tool to either condemn or condone the behaviour of States.

Kritsiotis's erudite expression, the "haze of competing and often irreconcilable interpretations" is equally applicable to the attempts to apply definitions and thresholds to Article 3. Attempts are made by the Courts to achieve a balance between necessity of human violation and humanitarian standards of behaviour. There is no necessity for torture and other abusive conduct, yet this is just the route advocated by those who would legitimise torture, just as it is for those who legitimise war.

### **Corporal Punishment**

The knotted problem of corporal punishment graphically demonstrates the dangers of competing and irreconcilable interpretations. Noting as we must the organic nature of Article 3, it is still important to remind ourselves that the non-derogable nature of the Article 3 guarantee demands that all aspects of unacceptable conduct should be proscribed. The evolving standards of European society should not always be paramount, they should be considered at the bottom as much as the top of the scale.

Considering non-judicial corporal punishment, one sees that the Courts attitude towards its illegality has, to say the least, been ambivalent. The remarks of Judge Fitzmaurice in the case of *Tyler -v- United Kingdom*<sup>32</sup> memorably summed up the position:

I have had to admit that my own view may be coloured by the fact

31 At page 245.

32 See (1978) 2 EHRR 1 at 22-4.

that I was brought up and educated under a system according to which the corporal punishment of schoolboys (sometimes at the hands of the senior ones - prefects or monitors - sometimes by masters) was regarded as the normal sanction for serious misbehaviour, and even sometimes for what was much less serious. Generally speaking, and subject to circumstances, it was often considered by the boys themselves as preferable to probable alternative punishments such as being kept in on a fine summer's evening to copy out 500 lines or learn several pages of Shakespeare or Virgil by heart, or be denied leave of absence on a holiday occasion.

The judge went on to state that he could not recall any boy feeling degraded or debased and added:

Indeed, such is the natural perversity of the young of the human species that these occasions were often seen as matters of pride and congratulation - not unlike the way in which members of the student corps in the old German universities regarded their duelling scars as honourable.

But corporal punishment in any of its manifestations amounts to a total lack of respect for the human being, irrespective of their age. In history and to this day, it has been a feature of matrimonial abuse, most often by man upon woman. Sometimes it occurs in the armed forces.<sup>33</sup> The fact is that it can now, legally, only be inflicted upon children.

Interpretation of this form of ill-treatment is in a state of confusion. Compare the following three cases:

Corporal punishment was inflicted upon a 16 year-old girl pupil in an English school by a man in the presence of another man resulting in an injury visible for several days. The Court held that the humiliation caused did attain a sufficient level of seriousness to be regarded as degrading.<sup>34</sup> In another case, a 15 year-old boy at an independent school in England was caned four times on his buttocks through his trousers, causing heavy bruising and swelling of both buttocks. The Court found a violation of Article 3 but the application was subsequently struck out by the Court following a friendly settlement under which the British

33 See the Deepcut Review by Nicholas Blake QC, HC 795.

34 See *Warwick -v- United Kingdom* Application No. 9471/81.

government, without any admission of liability, paid the applicant damages.<sup>35</sup>

But compare a few months later when a seven year-old pupil in an English independent boarding prep-school was given three blows on his buttocks through his shorts with a rubber soled gym shoe without causing any visible bruising but on the evidence turning a “confident, outgoing seven year-old into a nervous and unsociable child”, the Court held that the punishment was not degrading since the minimum level of severity had not been attained.<sup>36</sup>

Other jurisdictions have not been so reticent to recognise the abusive behaviour involved in the corporal punishment of children. For instance, in Namibia, the Supreme Court has held that corporal punishment imposed on students in government schools pursuant to a disciplinary code was both degrading and inhuman. It was not in any way reduced in its seriousness because a young person might have recovered from such infliction upon their dignity sooner than an adult might have done in comparable situations. As Mahomed AJA noted, corporal punishment

remains an invasion on the dignity of the student sought to be punished. It is equally clearly open to abuse. It is often retributive. It is equally alienating. It is also degrading to the student sought to be punished, notwithstanding the fact that the head of the school who would ordinarily impose the punishment might be less of a stranger to the student concerned than a prison official who administers strokes on a juvenile offender pursuant to a sentence imposed by a Court.<sup>37</sup>

## Defences

Developing case law has also produced a mass of spurious “defences” to potential Article 3 violations. The European Commission has found that rigorous application of disciplinary measures upon prisoners, sometimes to ridiculous lengths, such as punishing them for putting their hands in their pockets, though having a depressing and discouraging effect on the prisoner did not constitute degrading treatment.<sup>38</sup> But four members of the Commission who dissented were of the view that the extremely oppressive application of disciplinary measures

35 See *Y -v United Kingdom* (1992) 17 EHRR 238.

36 See *Costello-Roberts -v- United Kingdom* (1993) 19 EHRR 12.

37 See *ex parte Attorney General of Namibia in re: Corporal Punishment by Organs of State* [1992] LRC (Const) 515.

38 *Hilton -v- United Kingdom European Commission* (1978) EHRR 104.

with its destructive effect on the applicant, who was described by medical witness as a “hysterical psychopath”, amounted to degrading treatment.

Considering methods of interrogation, the European Commission has attempted to distinguish between inhuman treatment and “rough treatment”<sup>39</sup>: “[There may sometimes be] a certain roughness of treatment of detainees by both police and military authorities [which] is tolerated by most detainees and even taken for granted”. This observation made by the Commission is resonant of the Court’s previous eulogising of corporal punishment of juveniles. So far as conditions of detention go, the European Court has sought to draw a distinction between, on the one hand, complete sensory isolation coupled with total social isolation which will constitute inhuman treatment and on the other hand segregation of a prisoner or removal from association with other prisoners which apparently does not amount to inhuman treatment.<sup>40</sup>

### The Death Penalty

Perhaps the biggest lacuna in the ambit of the European Convention on Human Rights, and for the purposes of this paper, Article 3, is their unacceptable failure to proscribe the death penalty.

It has been eloquently argued that capital punishment is inconsistent with Article 3 or its equivalent and that it should not be administered *per se*.<sup>41</sup> Being made to await execution can violate Article 3 and case law presents some illuminating reading on the arbitrary nature of the Courts’ interpretation as to what constitutes a breach.

The act of putting an individual to death will not breach Article 3. In *Soering -v- United Kingdom*<sup>42</sup>, the Court observed that Article 3 cannot be interpreted “as generally prohibiting the death penalty”. But it went on to say:

That does not mean however that circumstances relating to a death sentence can never give rise to an issue under Article 3. The manner in which it is imposed or executed, the personal circumstances of the condemned person and the disproportionality to the gravity of

39 *Denmark et al -v- Greece European Commission* (1976) 12 Yearbook 186 at 510.

40 See a range of cases including *X -v- United Kingdom* (1983) 6 EHRR 576.

41 See the New Zealand Bill of Rights. Rishworth, Huscroft, Optican & Mahoney. Oxford University Press (2003) and a consideration of Section 9 of the Bill.

42 See (1989) 11 EHRR 439 at 474.

the crime committed, as well as the conditions of detention awaiting execution, are example(s) of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3. Present day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded.

The very act of inflicting death on an individual can be both painful and degrading. For example, having the noose placed around the condemned individual's neck and the hood over his face on a commonsense level must be terrifying and humiliating. The exclusion of the death penalty from the purview of Article 3 is a prime example of the distinct lack of courage shown, over decades of interpretation, which prevents the prohibition of torture having its real effect. As the death penalty is not prohibited under Article 2, it could be categorised as a judicial killing and be proscribed by Article 3. But the present state of the law, and there is no indication that it will change, sees the European Convention on Human Rights and in particular Articles 2 and 3 which purport to hold life sacred, condoning the legalised termination of a human life following a criminal conviction. If, at the dawn of legal learning, we were to ask a lawyer to list acts or behaviour which should be proscribed by a document entitled The European Convention on *Human Rights*, it would not be beyond common sense to assume that one of the first items on that list would be that no individual should be taken from a court of law and under that court's orders have their life terminated.

Such punishment can only be born of revenge and retribution. It is certainly trite today to argue that the death penalty has any deterrent effect. Given therefore that the judicial termination of an individual's life is purely one born of State retribution, it remains a stain upon the Convention that the act of putting an individual to death does not violate any of the pre-eminent Articles.

### **The Death Row Phenomenon**

Waiting for death *is* potentially in violation of Article 3, as are strict or harsh conditions on Death Row, the applicant's age and his mental state. The so-called Death Row Phenomenon has been tackled by Article 3. In *Soering -v- United Kingdom*<sup>43</sup>, the United States and German authorities sought extradition of the applicant from the United Kingdom to stand trial for alleged murders which had occurred in the United States. The American prosecutor had called for

43 See (1989) 11 EHRR 439.

the imposition of the death penalty if the applicant was convicted. The crux of the applicant's argument was that a conviction in the US would lead to a 6-8 year period on Death Row, amongst other hardships, and this was found to contravene Article 3.

The recent execution of Saddam Hussein involved personal abuse and intimidation as the condemned man walked to the gallows. Coupled with this, the deplorable behaviour of photographing him before he died and broadcasting images of the condemned man before execution on a mobile phone potentially made certain States liable under Article 3 if they are held to be in occupation of Iraq. Here was an execution that bore little resemblance to justice, given the flawed nature of the proceedings (rather than the potential guilt of the defendant).

Yet Saddam's execution was no different to any other judicial execution. Though more obvious, the whole process was about revenge. As Rosemary Behan commented<sup>44</sup>:

with the noose around his neck, Saddam was personally abused and forced to listen to chants of support for the radical Shia cleric, Moqtadr al-Sadr. This doesn't take anything away from the nature of the execution, which anyone with an ounce of humanity will have found revolting.

It is not suggested that simply because society finds a thing revolting it should necessarily be proscribed. There are some who find the treatment of horses in the Grand National as revolting and abhorrent in terms of animal cruelty and care; nevertheless, there is an argument that it should not be banned but better regulated. But putting a human being to death in what is, without doubt, an act of state-orchestrated revenge must in all conscionable society be prime for proscription.

Lord Griffiths recognised the element of humanity when dealing with a Death Row Phenomenon<sup>45</sup> [although, strangely, not actually the death penalty]:

There is a distinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our

44 *The Times*, Wednesday 3 January 2007.

45 *Pratt -v- Attorney General for Jamaica* [1993] 2 LRC 349.

humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

In holding that no execution should take place more than five years after *sentence*, the Privy Council established that such a period must have passed since sentence of death before it can be said that execution will constitute cruel or inhuman punishment. It is not, however, regarded as a fixed limit applicable in all cases, but rather as a norm which may be departed from if the circumstances of the case so require. Therefore, in an appeal from Trinidad and Tobago, it was held that execution following the total delay of four years and ten months would constitute cruel and unusual punishment.<sup>46</sup>

Yet it cannot be realistic to assume that trauma and agony associated with a sentence of execution only commences upon pronouncement of that sentence. Any individual from the time of their arrest and charge of a capital offence must be under immediate trauma at the possibility that in due course they were in peril of receiving sentence of death.<sup>47</sup>

The majority of members of the Human Rights Committee have repeatedly affirmed that prolonged delay in the execution of a sentence of death does not *per se* constitute cruel, inhuman or degrading treatment. They have taken somewhat disingenuous sanctuary in the fact that the European Convention on Human Rights does not prohibit the death penalty. The mind-bending illogic of this position is apparent when one considers the following scenario: if a State executes a murderer after he has spent a prolonged period of time on Death Row, it will not violate any obligation under the Convention, but if the State refrains from executing the murderer, it will violate the Convention. This cannot be an interpretation which the creators of the Convention would have desired and it is incumbent upon the Courts to grasp the nettle of capital punishment and release the shackles upon Article 3 which may allow the only moral course to be taken.

The arbitrary and at times irrationally interpreted time limits to execute an individual also present uncomfortable scenarios. Setting a form of limitation period during which execution is lawful gives a state a clear deadline for executing an individual if it is to avoid violating its obligations under the covenant. It is perverse, to the point of nausea, that the limitation period to execute a person

46 *Guerra -v- Baptiste* [1995] 1 LRC 507; see also *Henfield -v- Attorney General* [1997] 1 LRC 506 where a lapse of an overall period of 3½ years following sentence of death before execution constituted inhuman or degrading treatment.

47 See the dissenting judgement of Lord Steyn in *Henfield -v- Attorney General*.

is only one year less than that to bring a civil action for non-personal injury damages.

Another implication of what can be termed the limitation period to execute is that a state is given a clear directive, though implicit, that the death sentence should be carried out as expeditiously as possible after it is imposed. This cannot be a proper interpretation of either the text or the spirit of the Convention. Sometimes it has to be acknowledged that a delay in execution can ultimately save the condemned individual, for instance, if a moratorium is placed on execution. It is inconceivable that the Convention would wish to take a stance which could result in a condemned individual being executed expeditiously when in time the sentence could be commuted.

### **Mandatory and Discretionary Death Sentences**

Violation may also occur if the death penalty is mandatory in nature.<sup>48</sup> Once again, Article 3 finds itself in the grip of intellectual dishonesty: whilst a well-planned, well-carried out execution seems to be perfectly legitimate, it might become illegitimate if the sentence is mandatory and the Court had no discretion. Whilst one can appreciate the jurisprudence relating to mandatory sentences and their non-compliance with Article 3, it sits ill at ease with an Article which is born more of morality than any other Article (with the possible exception of Article 2) that a person's death may be prevented if the Court had no choice but to impose it, but a prisoner in the opposite cell charged and convicted of a different offence who is discretionally sentenced to death, dies unassisted by Article 3.

### **Other Attempts to Dilute the Effect of Torture**

There continues to be debate as to the limitations of what can properly be categorised as torture. Recently, it has been argued that severe treatment of individuals whilst detained should be called torture whilst those who are not detained and receive similar treatment can be categorised as victims in violation of inhuman or degrading treatment. This is a dangerous trend.

Manfred Nowak and Elizabeth McArthur, the former UN special rapporteur on torture, argue<sup>49</sup> that the decisive criteria for distinguishing torture from cruel,

48 *Ng -v- Canada* (1993) IHRR 161.

49 See 'The Distinction between Torture and Cruel, Inhuman or Degrading Treatment': *Torture*, Vol. 16, No. 3, 2006.

inhuman or degrading treatment is not, as argued by the European Court of Human Rights, the intensity of the pain or suffering inflicted, but the purpose of the conduct and the powerlessness of the victim and that as such, the distinction is primarily linked to the question of personal liberty. They continue to argue that outside a situation of detention and similar direct control, the prohibition of cruel, inhuman or degrading treatment is subject to the proportionality principle. They assert that any use of physical or mental force against a detainee with the purpose of humiliation constitutes degrading treatment or punishment and any infliction of severe pain or suffering for a specific purpose amounts to torture.

This is a dangerous course and is an example of the pervasive attempt to define torture restrictively so as to not cheapen its impact. The beating of a law abiding citizen in the street may be just as severe and inappropriate as the beating of a detainee. A protestor vociferously demonstrating against the war in Iraq and who is perceived by the police as acting inappropriately is just as much entitled to a potential finding of torture if beaten to such a degree and in circumstances of the gravest severity as a detainee in a cell or an interrogation room. The argument that the proportionality principle will be evoked if a citizen is gravely beaten in the street misses the point. The prohibition of torture, inhuman or degrading treatment or punishment should not, and never be, governed to a determinative effect by precisely where a person is abused. Torture should be absolutely prohibited wherever it occurs and simply changing its name to enable proportionality to undermine it is nothing short of a continuing erosion, not only of the strictures of Article 3, but of society's general codes of morality.

Nowak and McArthur also seem to place unerring faith in the proportionality principle to ensure correct findings of cruel, inhuman or degrading treatment. Their faith is misplaced. Whilst there may be certain guidelines that attempt to assist judges to determine which mode of punishment is cruel, inhuman or degrading, proportionality does not lend itself to such analysis. This is not to say that there are no absolutes, one can imagine extreme examples that no rational person, could accept. These examples will be easy to decide should they come before a court. The real test of the efficacy of the proportionality principle in this respect is to enable judges to evaluate whether what the States say is proportionate or not. This is, of course, an invitation to impose subjective values. There is no objective standard of gravity. But as Scalia J stated in *Harmelin -v- Michigan*<sup>50</sup>: "Proportionality is a retributive concept and perfect proportionality is a talionic law".

50 See 501 US 957 at 989.

## Conclusion

This paper has sought to argue that the organic approach to the development of what is torture, cruel, inhuman or degrading treatment has, intentionally or not, resulted in a downgrading of society's censure upon the violation of human beings by other human beings. Academic thought and practical case law show a trend redefining torture and reserving it for the very extreme examples of human behaviour. It seems to be judged not upon the severity of the violation, but more upon how rare it is. This reticent approach to torture is a dangerous route. The courts continue to relocate and realign abusive practices from category to category within Article 3. That which comprised torture thirty years ago may not comprise torture now, and vice versa. The three divisions within Article 3 of torture, inhuman and/or degrading treatment or punishment begin to reflect more a football league table whereby teams or concepts are promoted or relegated over ensuing seasons depending upon their performance, rather than a predictable, consistent and clear statement of moral standards. The proponents of the "ticking bomb" argument hold that the pragmatic answer is to torture the individual. But to address this through interference with the threshold at which abusive behaviour may be classified as torture is unsustainable from a moral point of view.

This paper began by asserting that those who wished to undermine the moral status of Article 3 were, at the very least, squeamish. Far from being too broad a provision, the Article fails to proscribe some of the most heinous acts committed by human against human, chief amongst them the death penalty. Article 3 should be a broad instrument, capable of proscribing the basest of human behaviour. Tampering with the thresholds and facilitating get-out clauses, be it in the form of proportionality, relativity or straight forward 'defences' to Article 3, not only undermines the very principles of the Convention's founding thinkers and exposes those who propound this view as squeamish, it also presents an acceptance of the erosion of morals, values and the meaning of human dignity.

Ed Grieves<sup>1</sup>

# Guarding the Gates to Justice: the European Court of Justice and Terrorism

## Abstract

*This article addresses the approach adopted by the European Court of Justice in the recent decisions of PMOI v. Council of the European Union and PKK and KNK v. Council of the European Union regarding a number of European terrorist proscription regimes. In the first decision, the ECJ departed from its more restrictive approach adopted in past cases, declaring its own jurisdiction to review all aspects of the decision to proscribe; whilst in the second, it appears to have aligned itself with the European Court of Human Rights' approach in relation to the victim test. The article concludes that these decisions appear to be evidence of the Court's willingness and ability to address issues of fundamental rights and also to protect effective access to justice.*

## Introduction

The European Court of Justice has not traditionally been tasked with protecting fundamental human rights within the legal order of European Community, such being more readily associated with the jurisdiction of the European Court of Human Rights (ECtHR). That is, however, by nature as opposed to design. The ECJ has recognised its jurisdiction in the protection of fundamental rights on many occasions and acted upon such. However, the advent of the European terrorist proscription regimes, and a number of challenges to this, has charged the ECJ with resolving a number of complex legal issues regarding the most serious infringements of human rights in the most serious of contexts. The response by the ECJ to some of these challenges has been a vivid exercise in the protection of the fundamental principles concerning effective and practical access to justice.

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## EU Proscription Regimes and the Ambit of Review

The European proscription regimes emanate from the implementation of various UN security resolutions, thereby generating “lists” of individuals and entities that are to be prevented from funding “terrorism” who are to have their economic assets, activities and resources frozen.

On 27 May 2002, EC Regulation 881/02 created a regime specifically directed at “Usama Bin Laden, members of Al-Qaeda organization and the Taliban”. This regime is intended to directly reflect a list of individuals/entities drawn up and maintained by the United Nations Security Council (UNSC). The regime governed by EC Regulation 2508/01 is directed at “specific restrictive measures directed against certain persons and entities with a view to combating terrorism”. This regime is an exclusively EU legislative affair, whereby Member States, upon the decision of a “competent authority”, may recommend the proscription of an individual or entity to the Council, which must then unanimously agree in order to enter it onto the list.

In *Kadi v. Council and Commission* T 315/01 the Court of First Instance held on 21 September 2005 that the ambit of its review of decisions made under the 881/02 regime was limited by virtue of the fact the Council and Commission were obliged to act according to UN security resolutions and implement the proscription lists. The Court found that, while it did not have jurisdiction to review the UN resolutions by reference to community law, it did have jurisdiction to review their legality by reference to the principle of *jus cogens*:

225 It must therefore be considered that the resolutions of the Security Council at issue fall, in principle, outside the ambit of the Court’s judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. On the contrary, the Court is bound, so far as possible, to interpret and apply that law in a manner compatible with the obligations of the Member States under the Charter of the United Nations.

226 None the less, the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United

Nations, and from which no derogation is possible.

The subsequent review was therefore less penetrating than that required by familiar principles relevant under the European Convention on Human Rights (ECHR). However, in its judgment of 12 December 2006 in *PMOI v. Council of the European Union* T-228-02, the Court of First Instance (CFI) brought to bear the jurisprudence of the ECHR upon the 2580/01 proscription regime. It found that the list of proscribed persons/entities under this regime was not mandatory under any obligation member states had to the UNSC, and therefore community law applied in full.

After comprehensive criticism in respect of fundamental breaches of the right to a fair hearing, the right to an effective judicial remedy (and the associated necessity of adequate reasons being communicated for the decision), the CFI annulled the contested measure. The Court declared that, following an initial decision to proscribe under the 2580/01 regime, in principle, a full statement of reasons as to why proscription was necessary must be given to the subject of such proscription and again, in principle, the statement of reasons must refer not only to the statutory conditions of application of that regulation, but also to the reasons why the Council considers, in the exercise of its discretion, that such a measure must be adopted in respect of the party concerned. The Court also found that a hearing, subject to any restrictions due to “overriding considerations concerning the security of the community and its member states or the conduct of their international relations” should, in principle, be provided for after such initial decision. In the event that there was any doubt, the ECJ declared its own jurisdiction to review *all aspects* of the decision to proscribe, including the well-foundedness of any restrictions on information disclosed or any hearing.

After having been ousted from its traditional jurisdiction in respect of community measures in relation to Regime 881/02, it appears the ECJ has firmly grasped it in relation to the 2580/01 regime.

### **The PKK Judgment**

On 18 January 2007, the ECJ handed down its judgment in *PKK and KNK v. Council of the European Union* C-229/05 P, applying a flexible approach to its procedure and to the test of standing in order to give effect to the protection of fundamental rights.

The judgment concerned an appeal from the CFI of an adverse admissibility

decision on issues of standing. The substantive application brought by the PKK and KNK before the CFI sought annulment of a Council decision to proscribe the PKK under the 2580/01 regime. It was argued by the PKK, amongst other things, that because it had renounced violence and fundamentally altered its aims and structure, it should not have been entered onto the proscription list. The CFI ruled that if, on its own case, the PKK had ceased to exist then it was not possible for the PKK to endow a valid power of attorney upon Osman Öcalan in accordance with the rules of procedure of the Court to represent its interests before the Court. This ruling was overturned by the ECJ on the basis that the CFI had come to an unsustainable view of the facts as to whether the PKK had dissolved itself, to the extent that it could no longer challenge a decision which, itself, presumed its existence. In its judgment the ECJ reiterated the importance of giving practical effect to the ECHR protections concerning access to justice:

109 The European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the EC Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States. That right has also been enshrined in Articles 6 and 13 of the ECHR (see *Unión de Pequeños Agricultores v Council*, paragraphs 38 and 39).

110 It is particularly important for that judicial protection to be effective because the restrictive measures laid down by Regulation No 2580/2001 have serious consequences. Not only are all financial transactions and financial services thereby prevented in the case of a person, group or entity covered by the regulation, but also their reputation and political activity are damaged by the fact that they are classified as terrorists.

To this end the Court was willing to adapt the Court's rules of procedure with regard to an organisation lacking in legal personality, rules which have traditionally appeared inflexible and rigid:

114 The Statute of the Court of Justice, in particular Article 21,

the Rules of Procedure of the Court of Justice, in particular Article 38, and the Rules of Procedure of the Court of First Instance, in particular Article 44, were not devised with a view to the commencement of actions by organisations lacking legal personality, such as the PKK. In this exceptional situation, the procedural rules governing the admissibility of an action for annulment must be applied by adapting them, to the extent necessary, to the circumstances of the case. As the Court of First Instance rightly stated in paragraph 28 of the contested order, it is a question of avoiding excessive formalism which would amount to the denial of any possibility of applying for annulment even though the entity in question has been the object of restrictive Community measures.

### **Alignment of ECHR and ECJ?**

The second Applicant, the Kurdish National Congress (KNK), argued that it provided an international platform and association for various organisations devoted to the protection of Kurdish rights. It argued that the PKK and any successor organisation was such an integral member of the KNK that its proscription materially affected the KNK. The CFI ruled that the KNK did not pass the test of standing in that the decision was not of “direct and individual concern” to it and therefore the application was inadmissible. On appeal to the ECJ, it was argued by the KNK that it would have had standing before the ECtHR. In such circumstances, where fundamental rights were engaged, there would be an unacceptable tension between the ECJ and ECtHR if an applicant could establish standing before the ECtHR but not before the ECJ. It was argued that in such contexts the test of “direct and individual concern” should be widened, if necessary, to reflect the “victim” test under Article 34 ECHR. After reiterating the special significance of the ECHR and the status of fundamental rights in its judgment, the ECJ seemingly accepted the argument in principle but resolved it against the Applicant on the basis it was unlikely the “victim” test would be fulfilled in any event:

- 80 According to the case-law of the European Court of Human Rights, Article 34 of the ECHR requires as a general rule that, in order to be considered a victim within the meaning of that article, an applicant must claim to have been affected by a violation of the ECHR that has already taken place (see Eur. Court H.R., *Klass and Others v. Germany*, judgment of 6 September 1978, Series A

no. 28, § 33). It is only in highly exceptional circumstances that an applicant may nevertheless claim to be a victim of a violation of the ECHR owing to the risk of a future violation (see Eur. Commission H.R., *Tauira and Others v. France*, no. 28204/95, decision of 4 December 1995, Decisions and Reports 83-B, p. 112, at p. 130). It is apparent, however, from the case-law of the European Court of Human Rights that persons who claim to be linked to an entity included in the list annexed to Common Position 2001/931, but who are not included in it themselves, do not have the status of victims of a violation of the ECHR within the meaning of Article 34 thereof and that, consequently, their applications are inadmissible (see Eur. Court H.R., *Segi and Gestoras Pro-Amnistia and Others v. 15 States of the European Union* (dec.), nos. 6422/02 and 9916/02, ECHR 2002-V).

- 81 The KNK's situation is comparable to that of the persons linked to the abovementioned entities Segi and Gestoras Pro-Amnistia.....
- 82 In those circumstances, the case-law of the European Court of Human Rights, as it currently stands, appears to indicate that the KNK would not be able to establish that it has the status of a victim within the meaning of Article 34 of the ECHR and therefore would not be able to bring an action before that court.
- 83 Consequently, in the circumstances of the present case no conflict between the ECHR and the fourth paragraph of Article 230 EC has been established.

This is significant in the further development of the relationship between the two Courts, particularly since the direct and individual concern test has been often perceived to be restrictive.

## Conclusion

In a jurisdiction which has been often been perceived as possessing a rigid and inflexible approach to procedure and one which was notionally related, but distinct, from the jurisdiction of the European Court of Human Rights, these

cases reflect the Court's willingness and ability to respond to matters concerned squarely with fundamental rights and also to protect one of the most fundamental of rights protected by the rule of law: effective access to justice.



Professor Bill Bowring<sup>1</sup>

# Negating Pluralist Democracy: The European Court Of Human Rights Forgets the Rights of the Electors

## Abstract

*This article reviews some recent decisions of the European Court of Human Rights (ECtHR) in relation to Article 3 of Protocol 1 to the European Convention on Human Rights (ECHR). It first explores the provenance of this rather oddly worded provision, starting with Article 21 of the Universal Declaration on Human Rights of 1948 (UDHR), and the rather fraught negotiations which took place in the first years of the Council of Europe. This is then set against some of the arguments as to the meaning and content of the concept of “democracy”. Following an analysis of the case-law as it has developed over the years, the article looks in more detail at three recent cases of the ECtHR. In Ždanoka v Latvia (Grand Chamber decision of 16 March 2006)<sup>2</sup>, the Court, in a decision described by the leading dissent (Judge Rozakis) as “dubious” and “obscure”, has allowed the State a practically unlimited margin of appreciation. A similar trend can be observed in the Chamber judgment in Yumak and Sadak v Turkey (decision of 30 January 2007).<sup>3</sup>*

*This article argues that, in these decisions, the ECtHR appears to be forgetting a fundamental principle underlying the right to pluralistic democracy, which is that the “passive” right to stand as a candidate in elections is not the right of the candidate, but of the electors. Unless there is a very good reason indeed, the electors should be able to elect the candidate of their choice. Otherwise, how can there be free elections?*

## Introduction

The primary self-declared aims of the Council of Europe – the “three pillars”

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- 2 Application no. 58278/00, 16 March 2006; this was my own case, in which I represented the Applicant for more than 6 years
- 3 Application no. 10226/03, 30 January 2007; the applicants have filed a request for a Grand Chamber hearing - two dissenting judges expressly stated in their opinion that this case should be reviewed by the GC

–are “to protect human rights, pluralist democracy and the rule of law”.<sup>4</sup> The concept of a democratic society has been said to prevail throughout the ECHR<sup>5</sup>, and “is acknowledged as a fundamental feature of the European public order”.<sup>6</sup> The phrase “democratic society” appears in Articles 6 (right to a fair trial), 8 (right to respect for family and private life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of assembly and association), and Article 2 of Protocol 4 (freedom of movement). The phrase “necessary in a democratic society” in Articles 8-11 is the foundation of the principle of proportionality which has been developed in the case-law of the ECtHR - that interferences with the substantive rights are only permitted to the extent that they are “necessary in a democratic society” in pursuit of particular legitimate aims.<sup>7</sup> It is truly a golden thread running through the ECHR and the jurisprudence of the ECtHR.

Without proper attention to the meaning and effect of democracy, the whole edifice of the Council of Europe is liable to collapse. At the same time, the very notion of “democracy” is highly contentious.

Article 3 of Protocol 1 states as follows:

#### Article 3 - Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

### **The Origins of the Council of Europe, and Sources for Human Rights**

Ian Brownlie and Guy Goodwin-Gill have correctly stated that the Council of Europe is “... an organization created in 1949 as a sort of social and ideological counterpart to the military aspects of European co-operation represented by the North Atlantic Treaty Organisation. [It] was inspired partly by interest in the promotion of European unity, and partly by the political desire for solidarity

4 At <[http://www.coe.int/T/e/Com/about\\_coe/](http://www.coe.int/T/e/Com/about_coe/)> (last accessed 16 May 2007)

5 *Oberschlick v Austria* No.11662/85, Series A, No.204, decision of 23 May 1991, (1995) 19 EHRR 389, para 58

6 Philip Leach *Taking a Case to the European Court of Human Rights* 2nd ed (2005) Oxford: Oxford University Press, p.161

7 Leach, *ibid*, p.163

in the face of the ideology of Communism.”<sup>8</sup> In other words, the Western European states wished to demonstrate that they were as serious about the “first generation”, civil and political rights, as the USSR and its allies undoubtedly were with regard to the “second generation” social and economic rights. After all, the “Communist” states guaranteed the rights to work, social security, health care, education and so on not only in their constitutions but in practice.

The Council of Europe had its origins in May 1948, when 1000 delegates met at the Hague Conference<sup>9</sup>. This has been called “The Congress of Europe”. A series of resolutions was adopted at the end of the Congress. These called, amongst other things, for the creation of an economic and political union to guarantee security, economic independence and social progress; for the establishment of a consultative assembly elected by national parliaments; for the drafting of a European charter of human rights; and for the setting up of a court to enforce its decisions. The last of these was the most revolutionary. There was no precedent in international law for an international court with the power to interfere in the internal affairs of its member states, and to render obligatory judgments.

The Congress also revealed some stark differences in approach. These divided unconditional supporters of a European federation (for example, France and Belgium) from those states that preferred straight-forward inter-governmental co-operation, such as the United Kingdom, the Republic of Ireland and the Scandinavian countries.

On 27 and 28 January 1949, the five ministers for foreign affairs of the Brussels Treaty countries, meeting in Brussels, reached a compromise. This was for a Council of Europe consisting of a ministerial committee, to meet in private; and a consultative body, to meet in public. In order to satisfy the United Kingdom and its allies, the Assembly was to be purely consultative in nature, with decision-making powers vested in the Committee of Ministers. In order to satisfy the federalists, members of the Assembly were to be independent of their governments, with full voting freedom. The United Kingdom had demanded that they be appointed by their governments. This important aspect of the compromise was soon to be reviewed and, from 1951 onwards, parliaments alone were to choose their representatives.<sup>10</sup>

8 Ian Brownlie and Guy Goodwin-Gill *Basic Documents on Human Rights* 5th ed (2006) Oxford: Oxford University Press, p.609

9 At <[http://www.coe.int/T/E/Com/About\\_Coe/1000delegates.asp](http://www.coe.int/T/E/Com/About_Coe/1000delegates.asp)> (last accessed 16 May 2007)

10 At <[http://www.coe.int/T/E/Com/About\\_Coe/Parliamentary\\_assembly.asp](http://www.coe.int/T/E/Com/About_Coe/Parliamentary_assembly.asp)> (last accessed 16 May 2007)

The Statute of the Council of Europe<sup>11</sup> opened for signature<sup>12</sup> on 5 May 1949<sup>13</sup>, defines “democracy” in the Preamble:

Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy

As a definition, this is not very satisfactory at all. Yet as a statement of commitment to an ideal, however defined, it could not be clearer.

### **Article 21 of the Universal Declaration of Human Rights**

Negotiations for the Convention drew on the 1948 Universal Declaration of Human Rights<sup>14</sup> as the primary source, on which all the Western European states, as members of the United Nations, were bound to agree. This reliance was especially so with regard to enshrining the principle of “pluralist democracy” in Article 21. This provides as follows:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Charlotte Steinorth reminds us that the UDHR, as with the other UN human rights instruments promulgated during the Cold War, were designed to be – they had to be – acceptable to a variety of political systems. It should be noted that the right to political participation as set out in Article 21 of the UDHR, refers to the “will of the people” as the basis of governmental authority and provides for equal

11 At <<http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>> (last accessed 16 May 2007)

12 The 10 states which signed it on that day were Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the UK.

13 It came into force, following 7 ratifications, on 3 August 1949.

14 At <<http://www.unhcr.ch/udhr/lang/eng.htm>> (last accessed 16 May 2007)

and universal suffrage. She points out that this has often been read by Western commentators as expressing the essence of liberal democracy. “While the article laid down the principle of popular sovereignty, its lack of specification as to the requirement of pluralism significantly reduced the right’s liberal democratic meaning, making it applicable to a diversity of political systems.”<sup>15</sup>

Gregory Fox and Brad Roth make a similar point: “Article 21 of the UDHR, in a manner strikingly dissimilar to that of the document’s other Articles and that of the ICCPR, speaks not merely of the individual right to take part in government, but also of the principle that ‘[t]he will of the people shall be the basis of the authority of government.’”<sup>16</sup> Asbjørn Eide also has noted<sup>17</sup> that the statement in Article 21 that

the will of the people shall be the basis of authority of the government... goes beyond the conceptions held by most adherents of the social contract in the 18th century, which required only that the government had the consent of the governed. Only a select few were held to be suited to participate in the exercise of authority. Article 21 implies a right for all to participate, directly or through freely chosen representatives, in the exercise of government, and equal rights for all of access to public service. It consolidates, therefore, the notion of freedom with and through participation.

The “inclusive list” in Article 21 – periodic, equal, universal, direct (or through representatives) and secret suffrage – “were present in the constitutions of China, France, the USSR and Yugoslavia”, as Johannes Morsink notes.<sup>18</sup> This is how the draft article appeared in the Draft Outline of International Bill of Human Rights prepared by John P. Humphrey. The Third Session of the UN Commission on Human Rights, which took place in May-June 1948, was responsible for the fifth stage of drafting of the UDHR. A series of joint proposals from the UK and India cut down almost all the drafts to their bare minimum.<sup>19</sup> As a result, “democratic

15 Charlotte Steinorth, “Democratisation and International Law in the 21st Century: Whither the democratic entitlement ?” at <[www.bisa.ac.uk/2006/pps/steinorth.pdf](http://www.bisa.ac.uk/2006/pps/steinorth.pdf)> (last accessed 16 May 2007)

16 Gregory Fox and Brad Roth “Democracy and international law” (2001) v.27 *Review of International Studies* 327–352, p.335

17 Asbjørn Eide “Making Human Rights Universal: Achievements and Prospects”, at <[www.uio.no/studier/emner/jus/jus/JUR5710/h06/asbjorneide.doc](http://www.uio.no/studier/emner/jus/jus/JUR5710/h06/asbjorneide.doc)> (last accessed 16 May 2007)

18 Johannes Morsink *The Universal Declaration on Human Rights. Origins, Drafting and Intent*. (1999) Philadelphia: University of Pennsylvania Press, p.59

19 Morsink, *ibid*, p.11

details” in the draft were cut, leaving three short paragraphs: “Everyone has the right to take part in the government of his country, directly or through his freely chosen representatives”; “Everyone has the right of access to public employment in his country”; and “Everyone has the right to a government which conforms to the will of the people”. The phrase “the will of the people” was almost lost, but saved by Rene Cassin; and the UK delegation insisted that the provision for secrecy be taken out, because this could not be permitted in the colonies.<sup>20</sup> It is therefore highly noteworthy that, as Susan Waltz points out, “... on the text that eventually became Article 21, some twenty-eight voices joined the debate in the Third Committee, which put much of the detail back in, including delegates from Belgium, Uruguay, the United States, Greece, Brazil, Venezuela, Iraq, China, Haiti, Cuba, Sweden, the former Soviet Union, Lebanon, Philippines, and Saudi Arabia.”<sup>21</sup>

Furthermore, Article 29’s reference to a “democratic society” reinforces the democratic rights set forth in Article 21<sup>22</sup>:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

The fact of the (nascent) Cold war, and the involvement of so many states, is perhaps the reason that the word “democracy” does not appear in Article 21. As Fox and Roth have argued<sup>23</sup>, “No generally agreed definition has yet emerged,

20 Morsink, *ibid*, p.59

21 Susan Waltz “Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights” (2001) v.23 *Human Rights Quarterly* 44–72, p.55

22 Mary Ann Glendon, “The Rule of Law in the Universal Declaration of Human Rights” (2004) 2 *Nw. U. J. Int’l Hum. Rts.* 5 at <<http://www.law.northwestern.edu/journals/jihr/v2/5>> (last accessed 16 May 2007)

23 Gregory Fox and Brad Roth “Democracy and international law” (2001) v.27 *Review of International Studies* 327–352, p.331

though most international actors using the term appear, at a minimum, to refer to the familiar pairing of free and fair elections and certain ‘countermajoritarian’ political rights. Elections, as the procedural embodiment of ‘popular sovereignty’, are particularly emphasised,<sup>24</sup> though the UN Human Rights Commission included elections as only one of a long list of ‘rights of democratic governance.’<sup>25</sup>

Indeed, Article 21 of the Declaration states that “[t]he will of the people shall be the basis of the authority of government,” and that “this will shall be expressed in periodic and genuine elections.”<sup>26</sup> Implicitly, then, Article 21 links governmental legitimacy to respect for the popular will. Yet this linkage does not appear in the subsequent, and legally binding, International Covenant on Civil and Political Rights (ICCPR). Article 25 of the Covenant speaks of the right to participate in public affairs - including the right to genuine and periodic elections - but it does not purport to condition governmental authority on respect for the will of the people. The language of Article 25 was intentionally drafted broadly enough to accommodate the wide range of governmental systems in place among the initial parties to the Covenant.<sup>27</sup> As a result, even Soviet-bloc states felt free to ratify the Covenant. From their perspective, communist states satisfied the requirements of Article 25 by affording voters access to various participatory mechanisms as well as an opportunity to ratify their leadership in periodic, albeit single-party, elections.<sup>28</sup> Thus, the cost of consensus was language broad enough to obscure sharp differences among states on the nature of their commitment to democratic rule. The differences between the two articulations in the Universal Declaration and ICCPR are for this reason interesting. Brad Roth explains that:

- 24 Kurt Herndl, “The Case-Law of the Commission as Regards the Right to Free Elections (Article 3 of protocol 1),” in *The Birth of European Human Rights Law*, Michele de Salvia and Marti E. Villiger (eds.) (Baden-Baden: Nomos Verlagsgesellschaft 1998): (‘the right of an individual to take part in elections is quintessential for any democratic society and any democratic State.’)
- 25 This non-exclusive list refers to (a) the rights to freedom of opinion and expression, of thought, conscience and religion, and of peaceful association and assembly; (b) the right to freedom to seek, receive and impart information and ideas through any media; (c) the rule of law; (d) the right of universal and equal suffrage, as well as free voting procedures and periodic and free elections; (e) the right to political participation; (f) transparent and accountable government institutions; (g) the right of citizens to choose their government system through constitutional or other democratic means; and (h) equal access to public service. Promotion of the Right to Democracy, Comm. HR Res. 1999/57 (27 April 1999) (approved by a vote of 51–0–2).
- 26 Andrew K. Coleman and Jackson N. Maogoto “Democracy’s Global Quest: A Noble Crusade Wrapped in Dirty Reality?” (September 3, 2003). *ExpressO Preprint Series*. Working Paper 42. <<http://law.bepress.com/expresso/eps/42>> (last accessed 16 May 2007)
- 27 See Henry J Steiner “Political Participation as a Human Right” (1988) 1 *Harvard Human Rights Year Book* 77, 87-88, 90, 93
- 28 Steiner, at p.91 (noting that an amendment requiring a pluralist political party system was withdrawn as a concession to the Soviet Union).

Article 21 of the Declaration can be read syllogistically to mean that the basis of governmental authority is such popular will as has been expressed in the elections, whereas non-liberal regimes would prefer it to mean that the popular will is (in some abstract sense) the basis of - and therefore expressed by - governmental authority, and is also expressed in elections. The Covenant version simplifies the matter by leaving undefined the relationship, if any, not only between authority and elections, but also between authority and participation.<sup>29</sup>

Most significant, however, is the fact that Article 21 says a great deal more than Article 3 of Protocol to the ECHR. This is no doubt because of the fact that the “small states” and others to which Waltz refers were able to prevent the UK from achieving the “minimalist” version it desired.

### The Drafting Process in the Council of Europe

The work of drafting the ECHR occupied the Committee of Ministers (meeting in secret) and the Consultative Assembly (meeting in public) from 11 May 1949 until 20 March 1952. The ECHR itself was opened for signature in Rome, 4 November 1950, while the First Protocol was opened for signature in Paris on 20 March 1952. The proceedings, so far as they were public, are published in the 8 volumes of the “*Travaux préparatoires*”.<sup>30</sup>

The reason why the ECHR was followed so soon by an additional Protocol is of vital importance to the argument of this article. Once again the UK played a malign role. Or at least started well – in one of the first hearings Sir David Maxwell-Fyfe, one of the UK’s representatives on the Consultative Assembly,<sup>31</sup> referred to the “...fundamental principles of democracy which the contracting states must respect. It includes... the right to organise political opposition, with the implication of the right to nominate opposition candidates at elections.”<sup>32</sup> Given the recent cases, those words now read somewhat ironically. The

29 Cited in Steiner, p.93

30 Council of Europe Collected edition of the “*Travaux préparatoires*” of the *European Convention on Human Rights in eight volumes* (1975-1985) Dordrecht: Martinus Nijhoff

31 As Lord Kilmuir, he became Lord Chancellor in a later Conservative administration; he became Chairman of Committee on Legal and Administrative Questions of the Consultative Assembly

32 Council of Europe *Collected edition of the “Travaux préparatoires” of the European Convention on Human Rights in eight volumes* (1975-1985) Dordrecht: Martinus Nijhoff, Volume 1 *Preparatory Commission of the Council of Europe, Committee of Ministers, Consultative Assembly (11 May – 8 September 1949)*, p.118

Rapporteur, MPH Teitgen of France, added that the right should include a duty by governments "... to take no action which will interfere with the right to organise a political opposition."<sup>33</sup>

All the UN human rights texts embody a commitment to a democratic form of government, and reflect four ideas, according to A W Brian Simpson. The first is that government should be based on the will of the people. The second is that all appropriately qualified citizens should be able to participate in the government of their country. The third is that the will of the people should be ascertained through periodic elections. The fourth is that elections should be free elections, with universal suffrage and a secret ballot.<sup>34</sup> The UK was committed to the UDHR.

It was not, however, in favour of implementing these principles in the ECHR. As Marston points out, after the failure of attempts to find a suitable practising barrister to serve as the "qualified personage" to be a member of a committee responsible for drawing up a draft Convention, Sir Oscar Dowson, lately senior legal adviser in the Home Office and retired for about two years, was nominated to represent the United Kingdom.<sup>35</sup> The evolution of the UK's position can be seen in Dowson's statement at the sitting of the Committee of Experts on 2 February 1950: "The UK Government desires the deletion of that part of this article which includes the undertakings regarding machinery of elections and the right of political opposition." He continued:

It may be explained that the proposals in this article relating to those matters, are of a constitutional and political character, and in the view of the United Kingdom Government are not appropriate for inclusion within the proposed Convention. The practical difficulties which would be raised by the inclusion of such an article are numerous. The following may be mentioned:

33 Travaux préparatoires, Vol 1, p.168

34 A W Brian Simpson *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001) Oxford: Oxford University Press (2001), p.757

35 Geoffrey Marston "The United Kingdom's Part in the Preparation of the European Convention on Human Rights, 1950" (1993) v.41 n.4 *International and Comparative Law Quarterly*, pp. 796-826, at p.807. As Marston notes C. M. Le Quesne of the United Nations Division of the Foreign Office minuted on 21 Dec. 1949: "I doubt whether a barrister could be expected to neglect his practice in order to serve as our unpaid representative on this Committee. On the other hand, even if it were decided to offer a salary I doubt whether we should be able to offer one big enough to compensate a man of any eminence for the work which he would be compelled to refuse" (ibid). Dowson had earlier been rejected as a possible candidate to represent the UK at the Commission of Human Rights in New York (FO 371172814 [UNE 30361161961]).

a) The impossibility of reaching agreement on what precisely are the fundamental principles of democracy. ...<sup>36</sup>

Despite this, the draft Report of 16 March 1950 of the Committee of Experts contained an appendix with the following: "To take no arbitrary action which will interfere with the right of criticism and the right to organise a political opposition."<sup>37</sup> This was plainly a matter of great controversy. On 4 August 1950, at the 5<sup>th</sup> session of the Committee of Ministers, the Irish delegate proposed an amendment as follows: "A clause should be included providing that no arbitrary action will be taken which would interfere with the right of a democratic political opposition to criticise and organise a political opposition on democratic lines."<sup>38</sup> This was not the view of the UK.

On 16 August 1950, at the second session of the Consultative Assembly, following the work of the Committee of Ministers, Mr Teitgen expressed his outrage at the draft Convention proposed by the Committee of Ministers, very much in the form in which it was opened for signature in November 1950.

The Convention with which we are now faced seems to be less liberal even than the very restrictive Statute of the Council of Europe... they linked very closely together... the fundamental individual freedoms and the basic principles of political democracy... [he referred to the Preamble, as set out above]. So, in the opinion of our Governments, these three fundamental ideas, individual freedom, democracy and the rule of law, are three aspects of one reality. And now today, we are being asked to guarantee individual freedoms without guaranteeing democracy and the fundamental principles of its institutions! And upon what is the argument based? Upon a theoretically possible separation between the two – utter nonsense!<sup>39</sup>

He pointed out that just such a separation was put into practice – on the other side of the Iron Curtain. Debates in the Consultative Assembly were correspondingly stormy.<sup>40</sup>

36 *Travaux préparatoires*, Vol. 3 *Committee of Experts (2 February – 10 March 1950)* p.182

37 *Travaux préparatoires*, Vol. 4 *Committee of Experts – Committee of Ministers conference of Senior Officials (30 March – 17 June 1950)*, p.54

38 *Travaux préparatoires*, Vol.5 *Legal Committee, Ad Hoc Joint Committee, Committee of Ministers, Consultative Assembly (23 June – 28 August 1950)*, p.60

39 *Travaux préparatoires*, Vol.5, p.288

40 *Travaux préparatoires* Vol.6 *Consultative Assembly*

Simpson points out that the failure of the Ministers to incorporate the three rights caused great irritation, and it was known that Britain had led the opposition to their inclusion.<sup>41</sup> This was the result of a Cabinet decision of 24 October 1950. Following that decision the Foreign Office prepared a brief for Ernest Davies, the Parliamentary Under-Secretary of State, who was to attend the meeting of the Committee of Ministers in Rome. The brief pointed out that three new “rights” (Articles 10: right to property, 11: right to education, and 17: safeguarding of democratic institutions) had been proposed by the Assembly and that Davies should take the line that the Committee of Ministers had been satisfied with the previous draft and that there was no good reason for the Ministers to change their views.<sup>42</sup>

On 15 November 1950 the Lord Chancellor, Lord Jowitt made a statement in the House of Lords, in which he made it clear that Britain was one of the opposing countries over the clause on democracy.<sup>43</sup>

The Sixth Session of the Committee of Ministers (CoM), which took place on 3-4 November 1950, reported on 15 November 1950.<sup>44</sup> The CoM had not been able to come to a unanimous agreement on a number of amendments. The Report published for the first time the letter of the Chairman of the Committee on Legal and Administrative Affairs to the CoM, sent on 24 June 1950, making reference to Article 21 of the UDHR.<sup>45</sup> When this was debated at the 19<sup>th</sup> Sitting on 16 August 1950, Mr Norton wondered whether any Convention which did not guarantee the right to free elections or prohibit totalitarian interference with legitimate criticism by a democratic opposition could justly be called a Convention on Human Rights.<sup>46</sup> Mr Teitgen added that he was astonished to see that the Ministers had eliminated the principle of safeguarding political rights from the Convention.

At the meeting of the Consultative Assembly on 8 December 1951, Mr Teitgen

41 Simpson (2001), p.769

42 Marston (1993), p.821

43 Simpson (2001), p.770

44 *Travaux préparatoires*, Vol 7 *Standing Committee of the Consultative Assembly, Consultative Assembly, Committee of Experts, Committee of Ministers, Legal Committee (3 November 1950 – 15 May 1951)*

45 *Travaux préparatoires*, Vol.7, p.158

46 *Travaux préparatoires* Vol.7, p.158

outlined the sorry history of what had happened.<sup>47</sup> On 25 August 1950, the Consultative Assembly had decided to add to the Committee of Ministers' text the three fundamental rights now to be found in the First Protocol. On 4 November 1950, the Ministers had signed a Convention in Rome which did not include these rights. Feeling the strong criticism from the Assembly, the Ministers let it be known that they would study the possibility of a protocol. The Committee of Ministers adopted the Protocol on 3 August 1951.

Thus, the guarantees for democracy were left for the First Protocol, along with the rights to property and to education.

### The Contested Notion of Democracy

What is meant by the word "democracy"? Charlotte Steinorth has reminded us that the right to political participation provided for in the First Protocol to the European Convention for the Protection of Human Rights and Freedoms together with the civil and political rights guaranteed by the Convention itself, have been consistently interpreted by the Convention's organs in the light of liberal democratic standards of governance.<sup>48</sup> "Democracy", according to the European Court for Human Rights<sup>49</sup> "thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it." Steinorth adds that in addition to the requirement of multiparty democracy expressed in the European Convention, state practice within the Council of Europe and the European Community system has supported a regional norm of democratic governance.

As to the links between democracy and the Convention, the Court has made the following observations in *United Communist Party of Turkey and Others v. Turkey* (judgment of 30 January 1998)<sup>50</sup> :

Democracy is without doubt a fundamental feature of the European public order ... That is apparent, firstly, from the Preamble to the

47 *Travaux préparatoires* Vol.8 Consultative Assembly, Committee of Experts, Committee of Ministers, Legal Committee, Advisers to the Ministers (1 October 1951 - 20 March 1952)

48 Charlotte Steinorth "Democratisation and International Law in the 21st Century: Whither the democratic entitlement ?" BISA Annual Conference December 2006 University of Cork, at <<http://www.bisa.ac.uk/2006/pps/steinorth.pdf>> (last accessed 16 May 2007)

49 *United Communist Party of Turkey and Others v. Turkey*, Application No. 19392/92, Judgment of 30.01.1998, para. 45. Reports of Judgments and Decisions 1998k -I.

50 Reports of Judgments and Decisions 1998-I pp. 21-22, § 45, quoted in *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, § 47, ECHR 2002-II)

Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights ... The Preamble goes on to affirm that European countries have a common heritage of political traditions, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention ...; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society ...

However, the very word “democracy” is extraordinarily elastic, and contested. Everyone agrees that “democracy” is a good thing, but there is little agreement as to what exactly it is. At the inception of the Council of Europe it was, as noted above, defined negatively. It was everything that was not the “totalitarian” systems of the “communist” states. The proliferation of scare-quotes in this paragraph simply indicates that none of these terms is quite what it seems. The significance of this interplay of simulacra will be laid bare later in this article. Indeed, Gunnar Beck has noted that for the Strasbourg Court, as other courts, “...many judicial trade-offs between conflicting rights involve judgments about the meaning, legitimate limits and security requirements of democratic government.” He cites the decision in *Lustig-Prean and Beckett v UK*<sup>51</sup>, where the Court held (at para 80), that “the hallmarks” of a democratic society include “pluralism, tolerance and broadmindedness”. Beck comments that “None of these attributes can be said to be incontrovertible attributes of the core meaning of democracy; indeed none are democratic values on a classical view of democracy. The court here in fact assumes a historically highly contingent conception of liberal democracy where the requirements of majority rule are tampered by a high degree of social liberalism, perhaps even permissiveness.”<sup>52</sup>

A recent definition of “democracy” asserts that “... It is rather democracy’s status as rule *by* the people and *for* the people that is the distinctive core of the democrat’s faith.”<sup>53</sup> However, the question which has haunted this very faith was most savagely posed by Carl Schmitt before he became the official Nazi ideologist.

51 Applications nos. 31417/96 and 32377/96, Judgment of 27 September 1999

52 Gunnar Beck *The Normative and Conceptual Contestability of Human Rights*, 2007, unpublished draft with the author

53 Geoffrey Brennan and Loren Lomasky “Toward a Democratic Morality” chapter 9 in David Estlund (ed) *Democracy* (2002) Blackwell Readings in Philosophy, Oxford: Blackwell, pp.237-266, p.237

Analysing the “crisis of contemporary parliamentarism”, he argued that this crisis was “...in its depths, the inescapable contradiction of liberal individualism and democratic homogeneity.”<sup>54</sup> This is point made by many critics of Rousseau<sup>55</sup> and of Mill: how on their terms can democracy be enacted save in a homogenous ethnic community?

Pointing, as do many contemporary critics, to the fact that government is not the business of open debate but that “... what representatives of the big capitalist interests agree to in the smallest committees is more important for the fate of millions of people, perhaps, than any political decision.” He declared that the “actual circumstances of parliamentary business, openness and discussion have become an empty and trivial formality.”<sup>56</sup>

In a recent and highly sophisticated attempt to reconcile these tensions, Martin Loughlin argues that “... democracy cannot be understood in terms of some unmediated notion of popular will. The aspirations of the multitude inevitably conflict, which is precisely why the practice of politics has emerged. The aggregation of interests and opinions implicit in the concept of a democratic will can be recognised only when absorbed into some representative form.”<sup>57</sup> While he engages – in a complimentary fashion – with Schmitt’s notion of the “political”<sup>58</sup> as “resting on its own distinctions”, that is, between friend and enemy<sup>59</sup>, his formulation plainly does not take account of Schmitt’s criticism. Furthermore, in a recent influential work Jacques Rancière<sup>60</sup> condemns representation as from the start in the French and American revolutions as “... the exact contrary of democracy”<sup>61</sup>. Indeed, “There is, strictly speaking, no such thing as democratic government. Government is always exercised by the minority over the majority...”<sup>62</sup>.

The recent cases which are analysed later in this article exemplify the ECtHR’s

54 Carl Schmitt *The Crisis of Parliamentary Democracy* trans Ellen Kennedy (1988) Cambridge, Mass: The MIT Press, p.17 – preface to the 1926 Second Edition

55 Jean-Jacques Rousseau *The Social Contract* [1762] trans Maurice Cranston (1968) Harmondsworth: Penguin

56 Schmitt (1988) p.50

57 Martin Loughlin *The Idea of Public Law* (2003) Oxford: Oxford University Press, p.112

58 Carl Schmitt *The Concept of the Political* [1932] trans G. Shwab (1996) Chicago: University of Chicago Press

59 Loughlin (2003) p.155-6

60 Jacques Rancière *Hatred of Democracy* trans Steve Corcoran (2006) London: Verso

61 Rancière (2006) p.53

62 Rancière (2006) p.52

attempt to resolve the circumstances of an eruption of representatives who threaten this rule of the minority.

### **The Court's Interpretation and Extension of Article 3 of Protocol 1**

So far, this article has shown first, that the content of Article 3 of Protocol 1 (P1-3) is a pale shadow of what was originally intended, and only narrowly survived the attempts of the United Kingdom to keep it out altogether; and second, that its content in the actual form in which it survived, is not immediately apparent.

There have to date been some 46 decisions on P1-3. I have represented the applicants in two of more recent decisions, *Podkolzina v. Latvia*<sup>63</sup>, and, over a period of six years, *Ždanoka v Latvia*<sup>64</sup>

The Court was first confronted with the need for authoritative interpretation of P1-3 in 1987 in the case of *Mathieu-Mohin and Clerfayt*<sup>65</sup>, a case which started in 1981. The two applicants were French-speaking Belgian nationals who complained that as voters living in municipalities in a Flemish language administrative district, they could not elect French-speaking representatives to the regional assembly under which their district came and, as elected representatives, that they could not sit in that assembly, whereas Dutch-speaking voters and elected representatives in the same municipalities could. Their complaints under Article P1-3 and Article 14 were dismissed. The Court held (para 57) that

The system does not appear unreasonable if regard is had to the intentions it reflects and to the respondent State's margin of appreciation within the Belgian parliamentary system - a margin that is all the greater as the system is incomplete and provisional. One of the consequences for the linguistic minorities is that they must vote for candidates willing and able to use the language of their region. A similar requirement is found in the organisation of elections in a good many States. Experience shows that such a situation does not necessarily threaten the interests of the minorities.

Five judges of the 18 in the Plenary Court dissented.

63 Application no. 46726/99, Judgment of 9 April 2002

64 Application no. 58278/00, Judgment of the Chamber (First Section) of 17 June 2004, Judgment of the Grand Chamber of 16 March 2006

65 Application no. 9267/81, Judgment of 2 March 1987, Series A no. 113

The Court confirmed the right of individual or group petition, and took the opportunity of explaining the meaning of P1-3. The majority acknowledged (para 47) that

Since it enshrines a characteristic principle of democracy, Article 3 of Protocol No. 1 (P1-3) is accordingly of prime importance in the Convention system.

The Court also noted (para 49) that

The travaux préparatoires also frequently refer to “political freedom”, “political rights”, “the political rights and liberties of the individual”, “the right to free elections” and “the right of election”.

And that “the idea was canvassed - only to be finally abandoned - of withholding the subject from the Court’s jurisdiction.”

The Court next (para 51) engaged in an important interpretation and extension of the words of P1-3, to include:

[the] concept of subjective rights of participation - the “right to vote” and the “right to stand for election to the legislature” (see in particular the decision of 30 May 1975 on the admissibility of applications nos. 6745-6746/76, W, X, Y and Z v. Belgium, *op. cit.*, vol. 18, p. 244).

P1-3 says nothing about limitations to these rights, and the Court summarised them in a passage (para 52) which has been repeated in every subsequent case under the article:

The rights in question are not absolute. Since Article 3 (P1-3) recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations ... In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3 (P1-3) (Collected Edition of the “Travaux Préparatoires”, vol. III, p. 264, and vol. IV, p. 24). They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 (P1) have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim;

and that the means employed are not disproportionate.... In particular, such conditions must not thwart “the free expression of the opinion of the people in the choice of the legislature”.

This last sentence therefore emphasised the most important express content of the article as it at last found its way into the First Protocol.

This is the article which is most closely connected to political and not simply individual human rights consideration, and this was recognised by the Court in para 54:

For the purposes of Article 3 of Protocol No. 1 (P1-3), any electoral system must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the “free expression of the opinion of the people in the choice of the legislature”.

All of these principles were repeated by the Court in *Podkolzina*, referring to some of the more recent decisions, including *Gitonas and Others v. Greece*<sup>66</sup>, *Ahmed and Others v. the United Kingdom*<sup>67</sup>; and *Labita v. Italy*.<sup>68</sup> The applicant is a Latvian citizen and a member of the Russian-speaking minority in Latvia. Her name appeared on the list of candidates for the National Harmony party for the elections to the national parliament (*Saeima*) of 3 October 1998. A requirement of eligibility to stand as a candidate in the elections was knowledge of the State language, Latvian. She had a certificate of competence from an appropriate state body. At the last moment, leaving her no time to appeal, another branch of the same body decided that her knowledge of Latvian was inadequate. The Court accepted the Government’s submission that “the obligation for a candidate to understand and speak Latvian is warranted by the need to ensure the proper functioning of Parliament, in which Latvian is the sole working language. They emphasised in particular that the aim of this requirement was to enable MPs to take an active part in the work of the House and effectively defend their electors’ interests.” (para 34,35).

66 Judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, pp. 1233-34, § 39

67 Judgment of 2 September 1998, *Reports* 1998-VI, p. 2384, § 75

68 Application no. 26772/95, Grand Chamber Judgment of 6 April 2000, § 201, ECHR 2000-IV

However, the Government was obliged to show that the decision to remove the applicant's name from the list of candidates was proportionate to the aim pursued. The Court reiterated that the object and purpose of the Convention, required its provisions to be interpreted and applied in such a way as to make their stipulations "not theoretical or illusory but practical and effective".<sup>69</sup> In particular the right to stand as a candidate in an election "would only be illusory if one could be arbitrarily deprived of it at any moment" (para 35).

Consequently, the Court continued:

...while it is true that States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires the finding that this or that candidate has failed to satisfy them to comply with a number of criteria framed to prevent arbitrary decisions. In particular, such a finding must be reached by a body which can provide a minimum of guarantees of its impartiality. Similarly, the discretion enjoyed by the body concerned must not be exorbitantly wide; it must be circumscribed, with sufficient precision, by the provisions of domestic law. Lastly, the procedure for ruling a candidate ineligible must be such as to guarantee a fair and objective decision and prevent any abuse of power on the part of the relevant authority.

These were the principles applied by the Chamber (First Section) in *Ždanoka v Latvia* in June 2004.

### **Circumstances in Which an Individual's Right to Stand as a Candidate can be Restricted**

On several occasions in the 1970s, the former European Commission of Human Rights was required to consider whether the decision to withdraw an individual's right to vote or to stand on account of her previous activities constituted a violation of P1-3. In practically all those cases, the Commission found that it did not. Thus, in the cases of *X. v. the Netherlands*<sup>70</sup> and *X. v. Belgium*<sup>71</sup> it

69 See, for example, *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, pp. 15-16, § 33; *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, Reports 1998-I, pp. 18-19, § 33; and *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 100, ECHR 1999-III).

70 Application no. 6573/74, Commission decision of 19 December 1974, DR 1, p. 88

71 Application no. 8701/79, Commission decision of 3 December 1979, DR 18, p. 250

rejected applications from two persons who had been convicted following the Second World War of collaboration with the enemy or “uncitizenlike conduct” and permanently deprived of the right to vote. In particular, the Commission considered that:

the purpose of legislation depriving persons convicted of treason of certain political rights and, more specifically, the right to vote [was] to ensure that persons who [had] seriously abused, in wartime, their right to participate in the public life of their country are prevented in future from abusing their political rights in a manner prejudicial to the security of the state or the foundations of a democratic society.

Furthermore, in the case of *Van Wambeke v. Belgium*<sup>72</sup>, the Commission declared inadmissible, on the same grounds, an application from a former member of the *Waffen-SS*, convicted of treason in 1945, who complained that he had been unable to take part in the elections to the European Parliament in 1989.

Finally, in the case of *Glimmerveen and Hagenbeek v. the Netherlands*<sup>73</sup>, the Commission declared inadmissible two applications concerning the refusal to allow the applicants, who were the leaders of a proscribed organisation with racist and xenophobic traits, to stand for election.

### *Ždanoka v Latvia*

Tatyana Ždanoka was born into a Russian-speaking family in Riga in 1950. Her family lived in Latvia for several generations, and following independence she was entitled to Latvian citizenship as a right – a right which she was obliged to vindicate in the courts, having been wrongfully denied by the Latvian Government following independence. She joined the Communist Party in 1971, and taught mathematics at Riga University until 1990. From 1990 until 1993 she was an elected Deputy in the Supreme Council of Latvia, and from 1989 to 1994 she was an elected Member of the Riga Municipal Chamber.

The Latvian Government never contradicted the fact that, following Latvia’s regaining of its independence in 1991, she ceased to be a member of the Communist Party. She founded and led political parties representing ethnic Russians, most recently the party “For Human Rights in a United Latvia”, on

72 Application no. 16692/90, decision of 12 April 1991

73 Applications nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, DR 18, p. 187

whose platform she became an MEP.<sup>74</sup> She was not only an elected politician, but worked as a human rights activist, founding the Latvian Committee for Human Rights (FIDH) and working on many occasions with the Council of Europe, OSCE and other bodies to promote peaceful resolution of the problems of contemporary Latvia. There was no evidence whatsoever that she had ever spoken or acted against Latvian independence or constitutionality.

On 13 January 1994, the Latvian parliament enacted a new restrictive law, the Municipal Elections Act, followed on 25 May 1995 by the Parliamentary Elections Act. Both provided that the following may not stand as a candidate for elections:

... persons who actively participated after 13 January 1991 in the CPSU (CPL), the Internationalist Front of Workers of the Latvian SSR, the United Council of Labour Collectives, the Organisation of War and Labour Veterans or the Latvian Committee of Public Safety, or in their regional committees; ...

On 25 January 1997 Ždanoka's party, the "Movement for Social Justice and Equal Rights in Latvia" submitted its list of ten candidates for the forthcoming municipal elections of 9 March 1997. She was one of those candidates. In line with the requirements of the Municipal Elections Act, she signed the list and attached a written statement confirming that she was not one of the persons referred to in the new restriction. In a letter sent on the same day she informed the Electoral Commission that she had been a member of the CPL's Pļavnieki branch and of its Central Committee for Supervision and Audit until 10 September 1991, the date of the CPL's official dissolution. However, she argued that the restrictions mentioned above were not applicable to her, since they were contrary to Articles 2 and 25 of the International Covenant on Civil and Political Rights, ratified by Latvia. Latvia had not yet ratified the ECHR.

The Riga Electoral Commission registered the list submitted by Ždanoka, implicitly accepting her argument. At the elections this list obtained four of the sixty seats on Riga City Council. Ždanoka was one of those elected.

Parliamentary elections were due to take place on 3 October 1998, and Ždanoka followed exactly the same procedure as in 1997. This time the Central Electoral Commission suspended registration of the list on the ground that her candidacy did not meet the requirements of the 1995 Act. Not wishing to jeopardise the

74 English web-site at [www.pctvl.lv](http://www.pctvl.lv) (last accessed 17 May 2007)

entire list's prospects of being registered, the applicant withdrew her candidacy, after which the list was immediately registered.

The Central Electoral Commission asked the the State Procurator General to examine the legitimacy of the applicant's election to the Riga City Council. However, the Procurator General's Office found in August 1998 that Ždanoka had not committed any action defined as an offence in the Criminal Code. The decision stated that, although she had provided false information to the Riga Electoral Commission regarding her participation in the CPL, there was nothing to prove that she had done so with the specific objective of misleading the Commission. Indeed, her application had stated precisely the form of her activity in the CPL. Nevertheless, in January 1999, the Prosecutor applied for a finding that she had been an "active member". Following a series of appeals, in December 1999 Ždanoka was disqualified from electoral office and lost her seat as a member of Riga City Council. It will be recalled that she had served blamelessly since March 1997. She applied to the Strasbourg Court in January 2000.

Ždanoka is now a Member of the European Parliament<sup>75</sup>, one of nine MEPs elected in June 2004 following Latvia's accession to the EU on 1 May 2004<sup>76</sup>, and is a member of Green/European Free Alliance group. An attempt by the Government in January 2004 to prevent her from standing, by amending the Parliamentary Elections Act of 1995, failed by two votes.

### **The Court's Chamber Decision in *Ždanoka***

The majority of the Court (by five, led by its President, Mr Rozakis, to two) focused on proportionality. It held (at paragraph 87) that such a restriction might "...serve a double function and may be analysed in two ways: as a punitive measure, i.e. as a sanction for having demonstrated uncitizenlike conduct in the past, but also as a preventative measure, where the applicant's current conduct is likely to endanger democracy and where his or her election could create an immediate threat to the State's constitutional system."

As to punishment, it held that this was a legitimate goal; but that generally speaking, the measure in question must remain temporary in order to be proportionate.

75 See <<http://www.europarl.europa.eu/members/public/geoSearch/view.do?country=LV&partNumber=1&language=EN&id=28619>> (last accessed 17 May 2007)

76 See <<http://www.guardian.co.uk/eu/country/0,14489,1195417,00.html>> (last accessed 17 May 2007)

In the Court's opinion, the restriction was indeed permanent, in that it was of indefinite duration and would continue until the relevant legislation is repealed. The cases decided by the Commission in the 1970s were not relevant, since the applicants had been convicted of particularly grievous criminal offences, such as war crimes or high treason; in contrast, in the present case, Ždanoka's activities had not given rise to any criminal penalties.

As to prevention, the Court held that in becoming involved or participating actively in those organisations during the period in question, Ždanoka could not reasonably have foreseen the adverse consequences that might arise in the future. Accordingly, she could not be accused of having been active in an illegal association.

The Court did not exclude the possibility that the restriction could have been justified and proportionate during the first years after the re-establishment of Latvia's independence (para 92), and accepted that to bar from the legislature persons who had held positions within the former regime's ruling body and who had also actively supported attempts to overthrow the new democratic system might be a legitimate and balanced solution, without it being necessary to look into the applicant's individual conduct; such a measure would be fully compatible with the concept of a "democracy capable of defending itself" relied on by the Government.

After a certain time, however, this ground was no longer sufficient to justify such prevention; it then became necessary to establish whether other factors, particularly an individual's personal participation in the disputed events, continue to justify his or her ineligibility.

In the circumstances of Latvia's inflexibility, the Court felt able to examine whether Ždanoka's conduct more than ten years previously still constituted sufficient justification for barring her from standing in parliamentary elections. The Court noted that she had never been convicted of a criminal offence in connection with her activities within the CPL. Secondly, in August 1991 a special committee of the Supreme Council was instructed to investigate the participation of certain members of parliament in the second coup d'état in Latvia; Ždanoka was not one of the fifteen members of parliament who were removed from their seats following this investigation. The Court therefore concluded that no sufficiently serious misconduct on her part had been proven. None of the evidence produced by the Government proved that she herself committed specific acts aimed at destroying the Republic of Latvia or at restoring the former system (para 94).

The Court was struck (para 95) by the fact that the restriction was not inserted in the electoral law until 1995 and did not exist at the time of the previous elections in 1993. That being so, it questions why parliament, if it considered that former active members of the CPSU and the CPL were so dangerous for democracy, did not enact a similar provision in 1993 – scarcely two years after the events complained of – but waited until the following elections.

The Court noted that the Government's concerns lay mainly in the fact of defending and disseminating ideas which are diametrically opposed to the Latvian authorities' official policy and which are unpopular among a large proportion of the population. However, said the Court, there is no democracy without pluralism. On the contrary, it is the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is currently organised and those which offend, shock or disturb a section of the population. In this it relied on two of the important Turkish cases, *Freedom and Democracy Party (ÖZDEP) v. Turkey*<sup>77</sup> and *Refah Partisi and Others v. Turkey*<sup>78</sup>. There was no evidence to enable the Court to conclude either that Ždanoka's activities were other than legal and democratic; nor that they were incompatible with fundamental democratic principles.

The Court concluded that the permanent disqualification from standing for election to the Latvian Parliament imposed on Ždanoka on account of her activities within the CPL after 13 January 1991 was not proportionate to the legitimate aims which it pursued, and curtailed her electoral rights to such an extent as to impair their very essence, and that its necessity in a democratic society had not been established. Accordingly, P1-3 had been violated.

It is submitted that the Chamber's decision was consistent both with the accumulated case-law of the Commission and Court, and with the principles underlying them in particular vindication of the essential ingredient of P1-3, "the free expression of the opinion of the people in the choice of the legislature". A sufficient number of Latvian electors evidently wished to elect Ždanoka; and there was no good reason why they should not be permitted to do so.

### **Latvia's Appeal to the Grand Chamber**

On 17 September 2004, the Government requested that the case be referred to

77 Application no. 23885/94, § 39, ECHR 1999-VIII

78 Application nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 86, ECHR 2003-II

the Grand Chamber<sup>79</sup>, and a hearing took place on 1 June 2005. Whereas the oral hearing before the Chamber had concentrated on points of law, the Grand Chamber heard arguments from the Agent for Latvia which were very much more political. Ždanoka was compared with Milosevic, and it was submitted that she should bear responsibility for the crimes of the USSR. An unusual number of judges intervened with questions such as whether she has ever publicly apologised for her previous membership of the Communist Party.

The Government argued first that the Chamber had misconstrued the extent of the margin of appreciation, and had then acted contrary to the subsidiary character of the Convention, violated the principle of the sovereignty of the State, and made the Court a further level of jurisdiction superimposed on those existing in the Contracting States. According to the Government, it did this by taking the place of the national authorities first, in fact-finding through evaluating Ždanoka's activities in order to establish whether she posed or poses an imminent danger to national security and democratic state system, and interpreting and applying domestic law so as to put right the alleged violation of her right to stand for election, following the restriction imposed on her.

The judgment was delivered on 16 March 2006. No doubt by complete coincidence, 16 March is also the date when each year veterans of the Latvian Legion, a force raised by the Germans and who fought alongside them in WWII, hold a march.<sup>80</sup> This march is regarded by Latvia's Russian community as highly provocative.

Furthermore, the Latvian lawyers from the Court's Registry indicated that a completely new test had been formulated for P1-3. This was contained in para 115, which stated:

... the Court reaches the following conclusions as to the test to be applied when examining compliance with Article 3 of Protocol No. 1:  
(a) Article 3 of Protocol No. 1 is akin to other Convention provisions protecting various forms of civic and political rights such as, for example, Article 10 which secures the right to freedom of expression or Article 11 which guarantees the right to freedom of association

79 It should be noted that in this, as in other cases, the applicant had no opportunity to respond to the Government's submissions in support of its request. The procedure for referral to the Grand Chamber is remarkably non-transparent.

80 See <[http://www.ce-review.org/authorarchives/amber\\_archive/amber25old.html](http://www.ce-review.org/authorarchives/amber_archive/amber25old.html)> (last accessed 17 May 2007)

including the individual's right to political association with others by way of party membership. There is undoubtedly a link between all of these provisions, namely the need to guarantee respect for pluralism of opinion in a democratic society through the exercise of civic and political freedoms. In addition, the Convention and the Protocols must be seen as a whole. However, where an interference with Article 3 of Protocol No. 1 is at issue the Court should not automatically adhere to the same criteria as those applied with regard to the interference permitted by the second paragraphs of Articles 8 to 11 of the Convention, and it should not necessarily base its conclusions under Article 3 of Protocol No. 1 on the principles derived from the application of Articles 8-11 of the Convention. Because of the relevance of Article 3 of Protocol No. 1 to the institutional order of the State, this provision is cast in very different terms from Articles 8-11. *Article 3 of Protocol No. 1 is phrased in collective and general terms, although it has been interpreted by the Court as also implying specific individual rights.* (My emphasis – BB) The standards to be applied for establishing compliance with Article 3 of Protocol No. 1 must therefore be considered to be less stringent than those applied under Articles 8-11 of the Convention.

(b) The concept of “implied limitations” under Article 3 of Protocol No. 1 is of major importance for the determination of the relevance of the aims pursued by the restrictions on the rights guaranteed by this provision. Given that Article 3 is not limited by a specific list of “legitimate aims” such as those enumerated in Articles 8-11, the Contracting States are therefore free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is proved in the particular circumstances of a case.

(c) The “implied limitations” concept under Article 3 of Protocol No. 1 also means that the Court does not apply the traditional tests of “necessity” or “pressing social need” which are used in the context of Articles 8-11. In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. In this connection, the wide margin of appreciation enjoyed by the Contracting States has always been underlined. In addition, the Court has stressed the need to assess any electoral legislation in

the light of the political evolution of the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another (see, *inter alia*, the *Mathieu-Mohin* and *Podkolzina* cases, cited above, *ibid.*).

(d) *The need for individualisation of a legislative measure alleged by an individual to be in breach of the Convention, and the degree of that individualisation where it is required by the Convention, depend on the circumstances of each particular case, namely the nature, type, duration and consequences of the impugned statutory restriction. For a restrictive measure to comply with Article 3 of Protocol No. 1, a lesser degree of individualisation may be sufficient, in contrast to situations concerning an alleged breach of Articles 8-11 of the Convention.* (my emphasis – BB).

(e) As regards the right to stand as a candidate for election, i.e. the so-called “passive” aspect of the rights guaranteed by Article 3 of Protocol No. 1, the Court has been even more cautious in its assessment of restrictions in that context than when it has been called upon to examine restrictions on the right to vote, i.e. the so-called “active” element of the rights under Article 3 of Protocol No. 1. In the *Melnychenko* judgment<sup>81</sup>, the Court observed that stricter requirements may be imposed on eligibility to stand for election to Parliament than is the case for eligibility to vote. In fact, while the test relating to the “active” aspect of Article 3 of Protocol No. 1 has usually included a wider assessment of the proportionality of the statutory provisions disqualifying a person or a certain group of persons from the right to vote, the Court’s test in relation to the “passive” aspect of the above provision has been limited largely to a check on the absence of arbitrariness in the domestic procedures leading to disqualification of an individual from standing as a candidate ...

The Grand Chamber, by 13 to 4, held that there had been no violation of P1-3.

In the further view of the majority, Latvia’s view that “even today” Ždanoka’s membership of the CPL and opposition to the break-up of the USSR “*can be considered to be in line with the requirements*” of P1-3. Furthermore, the restriction “has not been found to be arbitrary or disproportionate”. And while the restriction “may scarcely be considered acceptable” in more settled countries,

81 Application no. 17707/02, Judgment of 19 October 2004

“it *may nonetheless be considered* acceptable in Latvia...” The use by the majority of curiously tentative language will have been noted. Moreover, the Court said, “The applicant’s current or recent conduct is not a material consideration”, for the reason that the restriction was based on her membership in 1991. Thus, her unblemished record of support for democracy and human rights in the independent Latvia counted for nothing.

It is submitted that one of the final paragraphs (135) of their judgment exposed a contradiction at the heart of their reversal of the Chamber. The Court made the following extraordinary pronouncement:

It is to be noted that the Constitutional Court observed in its decision of 30 August 2000 that the Latvian Parliament should establish a time-limit on the restriction. In the light of this warning, even if today Latvia cannot be considered to have overstepped its wide margin of appreciation under [P1-3], it is nevertheless the case that the Latvian Parliament must keep the statutory restriction under constant review, with a view to bringing it to an early end. Such a conclusion seems all the more justified in view of the greater stability which Latvia now enjoys, *inter alia*, by reason of its full European integration. Hence, the failure by the Latvian legislature to take active steps in this connection may result in a different finding by the Court.

That is, on the one hand the restriction was within Latvia’s margin of appreciation; on the other, it must be repealed as soon as possible. Why should it be swiftly repealed if it did not in any event violate P1-3?

If the Latvian Act of 1995 appeared to have been enacted specifically to place and keep Ždanoka out of Latvian politics – indeed, the Latvian agent in her speech to the Chamber stated that the Act had been designed to punish her – then the majority of the Grand Chamber appeared to have done everything possible to ensure that she could not return, despite their highly adverse remarks as to the restriction.

In his highly critical dissenting opinion, Judge Rozakis (in addition to making some highly relevant remarks as to the nature of representative democracy) put his finger on the underlying issue:

... [in] paragraph 115 of the judgment the Court considers that “Article 3 ... is phrased in collective and general terms, although it has

been interpreted by the Court as also implying specific individual rights”. This sentence, although it ultimately does not have a radical impact on the Court’s further pronouncements (the sentence which follows in the same paragraph shows that this finding simply affects the standards to be applied for establishing compliance with Article 3, and does not constitute a complete negation of the Article’s substance as containing an individual right), is an obscure generalisation which contradicts not only the drafting history of the Protocol and the previous case-law of the Court, but also the letter of the present judgment itself, paragraph 102 of which states in less dubious, but still open-ended, terms that “the Court has established that this provision also implies individual rights, including the right to vote and to stand for election”.

I consider that, regardless of whether Article 3 of Protocol No. 1 is “phrased in collective and general terms”, it is clear that this Article does not simply imply an individual right but actually provides for one. The drafters’ aim was to enrich the Convention with a political right not differing from the other individual human rights contained in the original Convention. The Convention lays down, without exception, individual rights whose bearers are indiscriminately entitled to invoke them in their relations *vis-à-vis* the States parties and the Convention institutions. Hence, regardless of other possible functions, Article 3 *does* confer a specific individual right, which does not differ qualitatively from any other right provided for by the Convention.

As to Ždanoka herself, he said:

... even if we accept ... that in the circumstances of Latvia’s transition to democracy and its efforts to be disentangled from its recent past, such a harsh measure could have been justified during the first difficult years of adapting to the new regime and for the sake of democratic consolidation, the restrictions have nevertheless not been abolished to date, and this despite the fact that in the meantime Latvia has become a member State of NATO and, more importantly, of the European Union. We are now eleven years away from the date of the Act prohibiting the applicant from standing for election, fifteen years from the events which led to the belated promulgation of the Act, five years from the Constitutional Court’s decision, and almost two years from the election of the applicant to the European Parliament.

This author respectfully shares his view that the majority decision, and the new test with which the Registry lawyers were so pleased, is not only both “dubious” and “obscure”, but undermines the extensive established jurisprudence of the Court, as well as striking at the heart of the principle underlying P1-3, and the principle that the right concerned is the right of the electors and not the candidate. This will be returned to in the conclusion.

### The Recent Turkish Cases

On 30 January 2007, the Court delivered judgment in *Yumak and Sadak v Turkey*<sup>82</sup>. In this case, the applicants alleged that the national electoral threshold of 10% for parliamentary elections interfered with the free expression of the opinion of the people in the choice of the legislature. They argued that the high national threshold of 10% made representation very unfair and led to a crisis of legitimacy for the government, since parliament ought to be the free tribune of any democracy. Clearly, they said, a parliament whose composition reflected only about 55% of the votes cast was not capable of supplying the representative legitimacy on which any democracy is based.

The case was heard by the Second Section chamber. It may be noted that none of the judges, with the exception of the new President of the Court, Judge Costa, sat on the Grand Jury in *Ždanoka*. The Court reviewed the jurisprudence as set out above, with the exception of the Grand Chamber decision in *Ždanoka*, and noted that the 10% threshold is the highest in Europe, and that (para 73) “... after the elections of 3 November 2002 the electoral system concerned, which has a high threshold without any possibility of a counterbalancing adjustment, produced in Turkey the least representative parliament since the introduction of the multi-party system in 1946 (see paragraph 13 above). In concrete terms, 45.3% of the electorate (about 14.5 million voters) is completely unrepresented in parliament.” Nevertheless, the Court said that (para 76) “... it must accept that in the present case the Turkish authorities (both judicial and legislative) – but also Turkish politicians – are best placed to assess the choice of an appropriate electoral system, and it cannot propose an ideal solution which would correct the shortcomings of the Turkish electoral system”.

Thus, Turkey had not overstepped its wide margin of appreciation with regard to P1-3, notwithstanding the high level of the threshold complained of.

Of course, this was not a case of a restriction on a candidate, so the Court had no need to cite *Ždanoka*. But what is significant is that once more States are being given not only a “wide” margin of appreciation in cases concerning democracy, but, in effect, a margin with no effective limits.

## Conclusion

The principle at stake in *Ždanoka* is that the “passive” right to stand as a candidate in elections is the right of the electors and not the candidate. To give the state a margin of appreciation of the kind that now appears to be the norm for the ECtHR is to run the danger of negating the object and purpose of P1-3. Ironically, the Court may do through its jurisprudence what the UK failed to do in 1949-51.

Judge Rozakis put this well in his dissent in *Ždanoka*:

In a system of sound democratic governance the criterion of eligibility cannot be determined by whether a politician expresses ideas which seem to be acceptable to the mainstream of the political spectrum, or loyal to the established ideologies of the State and society, but by the real representativeness of his or her ideas *vis-à-vis* even a very small segment of society. Accordingly, if a politician is prevented from representing part of society’s ideas, it is not only he or she who suffers; it is also the electorate which suffers, it is democracy which suffers.

This is also the point made by Rancière. Democracy is precisely that which disrupts and unsettles the institutions of power.

Zozan Özgökçe,<sup>83</sup> Chnoor Ali Hama Amin<sup>84</sup> and Morten Thorsted<sup>85</sup>

# Protecting the Rights of Kurdish Women: The Legal Framework and Access to Justice in Turkey and Iraq

## Abstract

*This article<sup>86</sup> addresses the extent to which the legal framework in Turkey and Iraq permit the protection of the rights of Kurdish women, and the extent to which they are afforded access to justice. It is based on a KHRP report, which was commissioned by the European Parliament and involved field research in the regions, to investigate and provide an in-depth analysis of the root causes of the increase in female suicides in the Kurdish community. The article starts with a historical overview of the conflict of the Kurdish regions and an analysis of how this has impacted on gender dynamics. The article then addresses women's position within Kurdish society, focusing on patriarchal socio-cultural structures which women struggle to escape, and the resultant domestic abuse, 'honour' crimes and forced marriages, and how these factors have generated patterns of domestic abuse from which women have few means of escape. It identifies cultural, societal, political and economic inequalities as key factors that leave women vulnerable, both in the public and the private sphere, and examines the practical results of legislation and concrete actions put in place by the relevant Turkish and Iraqi authorities in order to ameliorate the situation of these women.*

## 1 The Situation of Women in the Kurdish Regions of Turkey and Iraq

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86 The authors would like to thank the following project team members, KHRP staff, and interns for their assistance in writing this article: Pranjali Acharya, Rachel Bernu, Lucy Claridge, Handan Çoşkun, Louisa Cox, Simon Flacks, Mustafa Gündoğdu, Gillian Higgins, Walter Jayawardene, Margaret Owen, Gabriella Tau, Tanyel Taysi and Kerim Yildiz

## 1.1 A Historical Overview

### 1.1.1 Turkey

The situation of women in the Kurdish regions of Turkey has long been, and continues to be, closely connected with the conflict that has marred the regions for decades. From 1984 to 1999 violent conflict between the Kurdistan Workers Party (PKK) and the Turkish military reigned in the southeast; during this time, over 3,000 Kurdish towns and villages were torched and destroyed by state security forces. As a consequence, an estimated three to four million mainly rural Kurdish villagers were displaced from their homes and forced to flee to nearby cities.<sup>1</sup> The hardships suffered by these internally displaced families disproportionately affect women and girls who, facing significant social, political, cultural and economic barriers, struggle to ameliorate their situation.

Despite a declared ceasefire in 1999, violent clashes between the PKK and the state security forces are still frequent. In May 2006, the International Crisis Group named the conflict in Turkey as one of ten conflicts in the world which had deteriorated significantly during that month. As of May 2007, 40,000 Turkish troops are stationed in Turkey's south-eastern provinces close to the Iraqi border. Lawyers, human rights advocates and representatives of Kurdish women's NGOs all fear that the political situation and conflict may worsen as the formalisation of the neighbouring Kurdish regions of Iraq as a federal state is completed.

There are no reliable statistics of how many people have been killed as a result of the conflict. However, there are millions of Kurdish girls without fathers, widows and wives of the 'disappeared' and many older women who are both widowed and have lost the sons and grandsons who would have supported them. These losses within the clans increase the tension in families as issues concerning bereavement, grief, the trauma of having witnessed brutal killings and torture are never addressed.

As a result of the conflict, violence has frequently been utilised by state security forces. Kurdish women in Turkey, many of whom are internally displaced persons (IDPs), are particularly vulnerable to state violence. Many Kurdish women have themselves been victims of torture as well as having been forced to witness the torture or killing of their relatives. They have also been victims of rape, sexual, emotional and psychological torture at the hands of the police, security forces

1 'Indiscriminate Use of Force: Violence in South-East Turkey', Fact-Finding Mission Report, Kurdish Human Rights Project (KHRP), 2006.

and village guards.<sup>2</sup> The honour of the family and the subordinate position of women often mean that these victims are forced to suffer in silence. Such pressure and crisis within the context of conflict is capable of generating extreme and desperate actions. The result of this is that many women suffer from mental health problems, which in some cases has led to women committing suicide.<sup>3</sup>

Some NGOs in Hakkari, Batman and Diyarbakır, Turkey, have listed post-traumatic stress, caused by state violence in previous years, as a cause of suicide and attempted suicide among women in the region,<sup>4</sup> although violence by the state is generally agreed to have decreased in recent years. However, the fear of violence by state officials, in particular the police, still appears to cling to the consciousness of many people living in the Kurdish regions.<sup>5</sup> Many of the people in the southeast have no confidence in the police and feel regarded as 'a different species'.<sup>6</sup>

#### 1.1.2 *Iraq*

Prior to 1991, the situation facing Kurdish women in Iraq was similar to that of their counterparts in the Kurdish regions of Turkey. As a result of the brutal oppression of the Kurds by the Baathist regime, Kurdish women in Iraq experienced fear, displacement, and violence along with the restrictions and occasional brutality of male-dominated society. Saddam Hussein's campaigns against the Kurds included destruction of villages, deportations, detentions, disappearances, murders, and kidnappings for sex trafficking. Furthermore, the regime utilised biological and chemical weapons against its own people. The most chilling example of this is the Anfal campaign, a series of military offences that took place in the spring and summer of 1988, which included the systematic use of chemical weapons against military and civilian targets. The campaigns killed an estimated 180,000, displaced 1.5 million, destroyed an estimated 3,000 villages and saw the detention, execution and disappearance of up to 100,000, a large number of whom were civilians.

2 In 1997, in a seminal judgment delivered in a case brought by the Kurdish Human Rights Project (KHRP), the European Court of Human Rights (ECtHR) ruled that the rape and physical ill treatment of a Kurdish woman while in police custody constituted torture in violation of Article 3 of the European Convention on Human Rights (ECHR). The Court further found that the public prosecutor's failure to complete a proper investigation constituted a violation of Article 13, ensuring an effective remedy by national authorities, see *Aydin v Turkey*, 23178/94, [1997] ECHR 75 (September 25, 1997).

3 KHRP, 'Kurdish politicians urge EU to keep pressure on Turkey', November 22, 2005.

4 Interview with SELİS, 27 January 2007

5 Interview with Mazlum-Der, Van Branch, 23 January 2007.

6 *Ibid.*

After the Kurdish uprising against the Baathist regime in 1991, the Kurdish regions of Iraq were divided into two administrative areas. The UN declared a safe haven and no-fly zone over the three north-eastern governorates (provinces) and the Iraqi government voluntarily withdrew all civil administration. Two major political parties, the Patriotic Union of Kurdistan (PUK) and Kurdish Democratic Party (KDP) governed in the de facto autonomous governorates, albeit from rival administrative bases. Regular violence, fuelled by an almost-fratricidal conflict between the PUK and KDP, reignited in 1994. Under UN sanctions and Saddam Hussein's embargo of trade with the north, the area's humanitarian crisis worsened. In 1998, an agreement was reached between the PUK and KDP which led to a viable power-sharing agreement for the Kurdistan Regional Government (KRG). Therefore, although ostensibly one government, each party maintained administrative control of different geographical areas within the KRG, leading to divergent treatment of women within the KRG itself.

Since 1991, the self-governing areas have generally experienced less repression and lawlessness than the rest of the country and, compared to the rest of Iraq, the Kurdish regions have thrived. Consequently, women in the autonomous region have gained more freedom of movement and speech and basic human rights than many women in other regions of Iraq. However, since the changes of 1991, the lives of Kurdish women in Iraq have been determined by the policies of the two political parties, the PUK and KDP and their patriarchal tribal structures. Some critics of the political parties claim that after the parties came to power, the region has seen a rise in co-called 'honour' crimes, including killings.<sup>7</sup> More widely reported are both parties' disregard of women's issues and their attempts to suppress women's organisations. In any case, as with their counterparts in Turkey, customary and religious practices continue to be more influential in the daily lives of the majority of women living in the Kurdish regions of Iraq, and their access to justice for incidents of domestic violence remains sidelined.<sup>8</sup>

Further, as a result of the brutality of the former regime, today there are millions of Kurdish widows in Iraq who have lost the sons and grandsons who would have supported them in their old age, as well as wives of the 'disappeared' and

7 Honour crimes occur when a woman, or sometimes a man, is punished or murdered for supposed sexual, marital or cultural offences, with the justification that the offence has violated the honour of the family.

8 Meeting with women's Organisations of the Halwest Group, Civil Development Organization (CDO), 17 January 2007; Interview with Mullah Mohammed Chamchamal, Sulaymanya, Iraq, 2 March 2007; Interview with Mullah Dr. Omar Ghazni, Islamic Union, Erbil, Iraq, 3 March 2007.

women who have grown up fatherless. These losses within the clans increase the tension in families as issues concerning bereavement, grief, the trauma of having witnessed brutal killings and torture are rarely adequately addressed.<sup>9</sup> This history of state violence, though widely recognised as destroying families and causing economic stress, overshadows and outweighs concerns about men and women's mental health. Issues such as mental health draw attention away from economic priorities and therefore frequently go unaddressed.

## *1.2 Women's position in Kurdish Society*

The lives of women in the Kurdish regions of both Turkey and Iraq are predominantly shaped by traditional patriarchal relations under which women's rights are regulated by a complex web of culture, religion, and nationalist practices. In this cultural environment, family pressures upon women constitute one of the main causes of suicide and attempted suicide. Incidents of domestic violence, including 'honour' crimes<sup>10</sup>, forced marriages<sup>11</sup>, the continuing practice of exchanging brides between two families<sup>12</sup>, marriage arranged from infancy, polygamy and a prohibition of choice in marriage have been cited frequently as root causes of women's suicide in a society where divorce is seldom an option, given the shame it brings to the family unit.<sup>13</sup>

### *1.2.1 Turkey*

In Turkey, women are generally perceived within society as second-class citizens.<sup>14</sup> The lives of Kurdish women in south-east Turkey are shaped by patriarchal practices, traditions and customs that govern all social zones, rather than the legal rights obtained on paper.<sup>15</sup> Most women are constantly faced with norms and practices forcing them to resign their right to be an individual and instead live as secondary citizens in the service of their families, as a 'girl-child', 'wife' or

9 Interview with Ibrahim Hawramani, Anfal Centre, Dohuk, Kurdistan, Iraq, 19 January, 2007.

10 Interview with Mazlum-Der, Van, 23 January 2007.

11 Interview with Mazlum-Der, Van, 23 January 2007; Interview with DTP, 25 January 2007; Interview with SELİS, Batman, 27 January 2007.

12 Interview with DTP, 25 January 2007; Interview with SELİS, in Batman, 27 January 2007.

13 Interview with Local Agenda 21, 30 January 2007.

14 Interview with AKP, Van, 23 January 2007. Interview with the Governor of Van, 23 January 2007; Interview with İHD, Hakkari, 25<sup>th</sup> January 2007.

15 Women for Women's Human Rights – New Ways: Women's Human Rights Training Program, 1995-2003, Evaluation Report, Associate Professor Nuket Kardam.

'mother'.<sup>16</sup> Family pressures upon women constitute one of the main causes of suicide and attempted suicide in the Kurdish regions of Turkey.<sup>17</sup> The feeling of lack of control over an individual's life is known to be a contributing factor to depression and suicide, and socially determined gender roles and responsibilities are considered far more likely to place women, rather than men, in situations where they may feel this lack of autonomy.<sup>18</sup>

Domestic violence affects up to half of all Turkish women and remains rooted in traditional patriarchal conceptions of femininity and the proper role of women. It is a pronounced problem in the Kurdish regions where high rates of unemployment and alcohol abuse are thought to be factors which often lead to incidents of domestic violence.<sup>19</sup> Perpetrators are rarely investigated or charged by the police, and women are not protected against aggressive husbands or other male relatives.<sup>20</sup> According to *Gewer Kadın Derneği*, an NGO based in Hakkari, the issue of domestic violence has become more visible within society in the past 3-4 years, and that most affected groups are IDP women.<sup>21</sup>

The impact of family pressure has been recognised recently in the 'Report on Women's Role in Social, Economic and Political Life' adopted by the European Parliament on 13 February 2007, in which the rapporteur Emine Bozkurt noted that 'suicides committed by women due to the influence of the family continue to occur, especially in the regions of the east and south-east' of Turkey.<sup>22</sup> Further, women's advocacy groups in Turkey have reported that there are dozens of 'honour' killings every year.<sup>23</sup>

Although statistics are hard to find, it is reported that in 2006, 39 women and 29 men were the victims of 'honour' killings in Turkey, while 116 women and

16 'Human Rights education as a tool of grassroots organizing and social transformation: a case study from Turkey' by Pinar İlkaracan and Liz Erçevik Amado, *Women for Women's Human Rights – New Ways*, Turkey, Intercultural Education, Vol.16, No.2, May 2005, pp.115-128.

17 Interview with 'AKP', Van, 23 January 2007; Interview with 'Mazlum-Der', Van Branch, 23 January 2007.

18 World Health Organisation, 'Gender and Mental Health', Geneva, 2002.

19 Interview with 'Mazlum-Der', Van, 23 January 2007.

20 'Turkey's Accession to the EU: Democracy, Human Rights and the Kurds' KHRP, 2006, p.32.

21 Interview with *Gewer Kadın Derneği*, Hakkari, 24 January 2007.

22 'Report on Women's Role in Social, Economic and Political Life in Turkey' adopted by the European Parliament on 13 February 2007, by Emine Bozkurt, at para.26.

23 US Department of State, 'Report on Human Rights Practices in Turkey 2005', section 5, (8 March 2006). At <<http://www.state.gov/g/drl/rls/hrrpt/2005/61680.htm>> (last accessed January 13, 2007).

at least 45 children were killed due to domestic violence.<sup>24</sup> A 'Custom Killings Report' prepared by the Turkish Parliamentary Investigatory Commission in November 2006, stated that between 2000 and 2005, 1091 murders were carried out in the name of custom or 'honour', although data collecting methods were considered to be unreliable and therefore actual numbers may be higher.<sup>25</sup>

In November 2006 a European Commission report linked 'honour' killings and suicides in Turkey, and there has been considerable speculation as to whether some suicides are in fact disguised 'honour' killings, and whether women are being forced to commit suicides by their families. However, there is a lack of reliable data on the phenomenon, as well as on domestic violence generally, and incidents of women's suicides are not always properly investigated.<sup>26</sup>

### 1.2.2 *Iraq*

Kurdish society in Iraq, in spite of considerable progress toward modernisation, continues to hold on to traditional, patriarchal relations of domination where women's rights are regulated by rules founded on culture, religion, and nationalist practices. These regulations include moral regulations as well as women's rights of divorce, marriage, inheritance, and custody. As in Turkey, women have been assigned a dual role in this patriarchal nationalist project. They are both the 'honour' of the nation, representing its cultural and linguistic purity, and the 'shame' of the nation, when they deviate from the rules. As such, Kurdish women in Iraq are expected to remain loyal to the nation, their own families, and the families of their husbands. Familial efforts to enforce these culturally ascribed gender roles can give rise to domestic violence, including 'honour' crimes and forced marriage, whilst the closed nature of society can make it difficult for women to escape abusive situations. Consequently, as is the case in the Kurdish regions of Turkey, family pressures upon Iraqi Kurdish women constitute one of the main causes of suicide and attempted suicide.

Domestic violence in all its forms occurs throughout the Kurdish regions of Iraq, but there is a lack of information on prevalence. Such abuse is customarily addressed within the tightly knit family structure. There is little public discussion of the subject, and there has been no study across the region to produce reliable

24 The International Helsinki Federation 'Human Rights in the OSCE Region: Europe, Central Asia and North America, Report 2005: Turkey' (8 June 2006). At <[http://www.ihfhr.org/documents/doc\\_summary.php?sec\\_id=3&d\\_id=4255](http://www.ihfhr.org/documents/doc_summary.php?sec_id=3&d_id=4255)>.

25 'Custom Killings Report' prepared by Parliamentary Investigatory Commission, Ankara, 25 November 2006

26 European Commission, 'Turkey 2006 Progress Report', (8 November 2006). At <<http://ec.europa.eu/comm/enlargement/docs/>>

statistics. Although statistics are hard to come by, and are of limited use as they represent only those cases that have come to the attention of the authorities, it is evident that 'honour' crimes occur in the Kurdish regions of Iraq. Further, reports of 'honour' killings, the most extreme form of 'honour crime', have increased since 1991, perhaps due to an increased willingness to speak out since the establishment of the Kurdish autonomous zone. Thus, over the past few years the rate has been rising, and recorded numbers stand at around 500 deaths per year, but again, this figure only reflects those that have come to the hospitals.<sup>27</sup> Many experts speculate, based on anecdotal evidence and media reporting, that in Erbil alone there is at least one killing per day.<sup>28</sup>

While girls and women across Kurdistan, Iraq remain subject to the whims of their male family members, women's lives today differ markedly from their peers in central and southern Iraq. Kurdish women in Iraq have held positions in the interim Iraqi governments, and urban Kurdish women strongly protested in 2004 when the Iraqi Governing Council attempted to scrap secular family laws and reinstate Shari'a law to define women's affairs. Despite a lack of support from international funding agencies, which prefer to focus on issues such as democracy building and elections, several NGOs that focus on women's issues have opened in Kurdistan.

## 2 Legal Framework and Implementation

### 2.1 Turkey

In addition to the commitments under EU accession standards, Turkey is party to international declarations, conventions and treaties, the majority of which are legally binding. The most significant of Turkey's international obligations regarding the rights of women, freedom of the individual, and the safety of persons in armed conflict, are contained within the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the first optional protocol<sup>29</sup>, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the United

27 Vian Ahmed Khidir Pasha, Member of Kurdistan National Assembly, Member of Women's Committee, Erbil, Iraq, 25 January 2007

28 Reported by several NGOs and members of Kurdistan National Assembly over course of study to project team member Tanyel B. Taysi.

29 CEDAW calls for the full and equal participation of women in political, civil, economic, social and cultural life, and the eradication of all forms of discrimination against women. CEDAW further endorses the empowerment of women and promotes positive discrimination in order to ensure gender equality.

Nations Guiding Principles on Internal Displacement<sup>30</sup>, and the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). Turkey has also ratified the Convention on the Rights of the Child, the Convention against Torture and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. The United Nations Declaration on the Elimination of Violence against Women<sup>31</sup> condemns gender-based violence in both the private and public spheres and obliges Member States to work towards its elimination. The United Nations Security Council Resolution 1325 on Women, Peace and Security requests the Secretary General to *inter alia* provide to Member States ‘training guidelines and materials on the protection, rights and the particular needs of women, as well as the importance of involving women in all peacekeeping and peace-building measures.’<sup>32</sup>

In the last two decades, the actions and advocacy of the women’s movement have succeeded in promoting a number of significant legal changes in Turkey. These efforts have been reinforced by the rise of a global women’s movement, greater attention to gender equality and women’s human rights at the global level through United Nations conferences and treaties, as well as through Turkey’s EU accession process. These achievements include the Constitutional Court’s annulment of Article 159 of the Civil Code which had stated that women had to get consent from their husband to work outside the home; the repeal by the National Assembly of Article 438 of the Criminal Code (which provided for a one-third reduction in the rapist’s sentence if the victim was a sex worker); and the addition of a new law to the Civil Code on domestic violence, enabling the survivor of domestic violence to file a court case requesting a ‘protection order’ against the perpetrator of violence. Furthermore, a reformed Civil Code was passed by the Turkish Parliament in November 2001, setting the equal division of the property acquired during marriage as the default property regime. The new Code also set the age of 17 as the legal minimum age for marriage for both men and women. In addition, Article 41 of the Constitution was amended to redefine the family as an entity based on equality between spouses.

In the revised Penal Code, characterisations of offences committed against women based in patriarchal notions of chastity, honour and shame have been

30 Although the Guiding Principles are not considered to be binding on Governments, they reflect international human rights and humanitarian legal obligations and therefore set standards which Turkey should respect in providing redress for IDPs.

31 General Assembly Resolution 48/104 of 20 December 1993.

32 United Nations Security Council resolution 1325 (2000) on Women and peace and security, 31 October 2000.

replaced with definitions based on international human rights norms. Sexual crimes are denoted as crimes against the individual rather than crimes against society, marital rape is criminalised, and rape is no longer legitimised when the perpetrator marries the victim.<sup>33</sup> There are however, several sticking points which need to be resolved within the revised Code. Although the killing of a woman in the name of 'honour' no longer serves as a partial justification for the crime leading to a reduced sentence, contrary to the lobbying efforts of women's groups, the new Code refers to 'custom killings' rather than 'honour killings'. It is not sufficiently clear that this term covers all murders committed according to 'honour' codes. In addition, although 'genital examinations' can now only be carried out if necessary for public health or, at the behest of a court, if required for the investigation of a crime, there is no requirement that the woman's consent must first be attained. These examinations or 'virginity testing' have been used in Turkey, where pre-marital virginity is customarily seen as critical to a woman's 'honour', as a highly invasive and discriminatory means of controlling female sexual relations.<sup>34</sup>

Although Turkey has tightened the punishments for 'honour crimes', it has been claimed that rather than such deaths being stopped, lives are being ended by different means. Parents are trying to spare their sons from the harsh punishments associated with killing their sisters by pressing the daughters to take their own lives instead.<sup>35</sup> Others have been stoned to death, strangled, shot or buried alive.

The UN Commission on Human Rights has addressed 'honour killings' in the context of the right to life and has called on states to 'investigate promptly and thoroughly all killings committed in the name of passion or in the name of honour (...) and to bring those responsible to justice before a competent, independent and impartial judiciary, and to ensure that such killings, including those committed by (...) private forces, are neither condoned nor sanctioned by government officials or personnel'.<sup>36</sup>

In January 2007, the Anatolia News Agency reported that the Turkish Minister

33 'Turkey's Accession to the EU: Democracy, Human Rights and the Kurds', KHRP, 2006, pp. 34-35.

34 'Turkey's Accession to the EU: Democracy, Human Rights and the Kurds', KHRP, 2006, p. 35.

35 Bilefsky D., 'Virgin suicides' save Turks' honor', *International Herald Tribune*, June 13, 2006

36 Commission on Human Rights, Report to the Social and Economic Council on the Sixteenth Session of the Commission, Resolution 2004/37 Extrajudicial, summary or arbitrary executions, UN doc. E/CN.4/2004/L.11/Add.4, 20 April 2004. <[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/0cfcde9575008463c1256e82002f683b/\\$FILE/G0413868.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/0cfcde9575008463c1256e82002f683b/$FILE/G0413868.doc)>, (last accessed 13 February 2007).

of Internal Affairs, Abdulkadir Aksu, had sent a circular to governors in which he stated 'that the prevention of honour killings was necessary to ensure basic rights and liberties, to boost the public's sense of peace and trust, and to confirm Turkey's esteemed place among the nations of the civilized world.'<sup>37</sup> He added that procedures regarding women or children which have fallen victims of violence and who have turned to law enforcement officers for help, should be handled by female officers, with the victims' psychological well-being paramount at all times. According to the circular, legal procedures regarding victims of violence will be handled under the Law Pertaining to the Preservation of Family, the circular dated 1 December 2006 and the Criminal Procedure Codes 5271 and 5395. The Public Prosecutor's Office will also be notified.<sup>38</sup>

Although this initiative of the Turkish Government should be welcomed, as the previous sections have detailed, despite legal reforms, the lives of many Kurdish women in Turkey continue to be shaped by customary and religious practices such as early and forced marriages, polygamy and 'honour' crimes. Professor Nükhet Kardam suggests that the sources of gender inequality 'may be variously attributed to traditions, cultures, customs, religion or the internationalist [*sic*] capitalist system.'<sup>39</sup> Violence against women in its various forms, within and outside the home, continues to be a widespread violation of human rights. Lack of education is also a major barrier to women obtaining justice. Women's opportunities to learn and implement their rights are constrained by the Turkish political, bureaucratic and cultural context. The Turkish State does not consistently and effectively uphold and enforce women's human rights.

It thus becomes evident that much progress is still required in Turkey before a legal framework in accordance with international standards is implemented.

## 2.1 Iraq

The legal framework which governs women's rights in Kurdistan, Iraq, comprises a combination of Shari'a law and secular federal and regional law. Further, Iraq is party to a number of international declarations, conventions, treaties and resolutions relevant to the rights of women, the most important being CEDAW, UDHR, ICCPR, the Convention on the Right of the Child, the United Nations

37 Anatolia News Agency, 11 January 2007.

38 Ibid.

39 Women for Women's Human Rights – New Ways: Women's Human Rights Training Program, 1995-2003, Evaluation Report, Associate Professor Nükhet Kardam, at p.8.

Declaration on the Elimination of Violence against Women<sup>40</sup>, and the United Nations Security Council Resolution 1325 on Women, Peace and Security.<sup>41</sup>

Despite the rights enshrined in international conventions, the new Iraqi Constitution fails to guarantee the rights of women in Iraq, including those in the Kurdish regions. In fact, at the heart of the Constitution there is an ambiguity that many critics consider to be a major step backward for women. The Constitution asserts that Iraqis are equal before the law ‘without discrimination because of sex’<sup>42</sup> and that ‘no law that contradicts the principles of democracy may be established.’<sup>43</sup> However, the Constitution also enshrines Islam as the official religion of the state and as a basic source of legislation—no law, it states, can be passed that contradicts the ‘undisputed rules of Islam.’<sup>44</sup> Another section of the Constitution of concern to critics deals with ‘personal law’, which governs issues such as marriage, divorce and inheritance. Article 39 of the Constitution declares that Iraqis are ‘free in their personal status according to their religions, sects, beliefs, or choices.’ Subsequent legislation will determine what this article means. Critics argue that if family matters are to be judged according to the law practiced by the family’s sect or religion, the Constitution may nullify much of Iraq’s personal status law, which provided women with some of the broadest legal rights in the Middle East.

The laws adopted in the areas controlled by the KRG have given women more rights, and there is currently a campaign to remove Article 7 from the draft Regional Constitution which enshrines Shari’a as the primary source of law. The Women’s Rights Protection Committee of the Kurdistan National Assembly has submitted to the Assembly the draft of a proposed bill of rights that seeks to make a number of changes in the personal status code, including making inheritance and laws related to marriage consistent with international standards.<sup>45</sup> However, reports from the region suggest that tribal leaders are using spurious interpretations of Islam as crutches to support and reintroduce archaic traditional practices to suppress women’s empowerment and equality in society. It is further alarming that many people in powerful positions appear to

40 General Assembly Resolution 48/104 of 20 December 1993.

41 United Nations Security Council resolution 1325 (2000) on Women and peace and security, 31 October 2000.

42 Article 14.

43 Article 2 (1) (b).

44 Article 2 (1) (a).

45 Kurdistan Regional Government webpage, [www.krg.org](http://www.krg.org).

condone these types of practices.<sup>46</sup>

The Iraqi Penal Code effectively encourages the persistence of violence in the family by allowing husbands to use violence against their wives with impunity. The 'exercise of a legal right' to exemption from criminal liability is permitted in cases of 'Disciplining a wife by her husband, the disciplining by parents and teachers of children under their authority within certain limits prescribed by Islamic law (Shari'a), by law or by custom.'<sup>47</sup> The Kurdistan National Assembly has passed several laws guaranteeing better protection of women's human rights, including outlawing domestic violence and polygamy except in case of infertility.<sup>48</sup>

However, although these laws are important steps, they are largely overlooked, and tribal custom takes precedence. Furthermore, even in the instance where constitutionally recognised laws are given precedence, there is disparate application of relevant laws due to lack of awareness and training for the judiciary in how and when to apply new laws.<sup>49</sup> Evidence suggests that judges and law enforcement generally rely on their personal knowledge and preferences of interpretation, rather than on unified and systemic interpretation and application.

Although statistics are hard to come by, and are of limited use as they represent only those cases that have come to the attention of the authorities, it is evident that 'honour' crimes, including the killing of women, occur in the Kurdish regions of Iraq. Although no longer applicable, there are provisions still on the books within Iraqi law for the issue of lenient punishments for honour killings; in 1990, Saddam Hussein introduced a law that exempted men who killed female relatives in defence of the family's honour from prosecution and punishment under the Penal Code.<sup>50</sup> According to Article 41 of the Iraqi Penal Code of 1959, no crime is committed in the punishment of a wife by her husband if it is seen

46 Interview with Chnoor Ali, women's rights activist, and Najeba Mahmud of CDO, Sulemánya, Iraq, 17 January 2007.

47 Article 41 (1).

48 Interview with Vian Ahmed Khidir Pasha, Member of Kurdistan National Assembly, Member of Women's Committee, Erbil, Iraq, 25 January 2007; Jambaz T. and Mohammed N., 'Bits from the reality of Kurdistan Women, 2004-1992, Iraqi Kurdistan as an example', Kurdistan National Assembly Women's Rights Protection Committee, 2006.

49 American Bar Association (ABA), 'Iraq Legal Development Project', *Judicial Reform Index for Iraq: Kurdistan Supplement*, October 2006, < <http://www.abanet.org/rol/publications/jri-iraq-kurdistan-2006.pdf> > (last accessed 13 April 2007).

50 U.N. Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women*, E/CN.4/2002/83, January 31, 2002.

as educational. These laws are still regularly used in courts as justification for honour killings or any type of family violence against women, even though the current Iraqi Constitution and Kurdistan Regional Law should be applied.<sup>51</sup>

Campaigning and lobbying by Kurdish women's organisations in Iraq against 'honour killings' has led to legislative reforms in the KRG area of northern Iraq. Further, the Women Affairs Committee in the Kurdistan National Assembly has worked significantly to ensure that women enjoy their rights in the Region. One of the most significant achievements of the Committee has been the changing of the law relating to the murder of women. Hence, in 2000 (PUK-controlled areas) and 2002 (KDP-controlled areas) the KRG amended its Penal Code, so as to outlaw 'honour' killings.<sup>52</sup> Prior to the introduction in 2000 and 2002 by the Kurdish authorities of reforms designed specifically to address 'honour killings', the perpetrators of such killings were either never tried or received generally lenient sentences.<sup>53</sup>

In June 2006, the United Nations Assistance Mission for Iraq (UNAMI) concluded that 'the Kurdistan Regional Government has been a leading voice in denouncing Iraqi 'honour killings' and its amendment of the penal code to consider such killings as ordinary crimes is commendable.' However, UNAMI also recognised that '...over the last six months there has been a significant increase in the rate of female mortality due to accidents or crimes in the Region of Kurdistan'.<sup>54</sup> In this regard Iraqi Kurdish women's organisations fear that more efforts are made to conceal 'honour killings', in order to avoid the judicial consequences. Indeed, it appears as if efforts are being made to conceal 'honour' killings in order to avoid justice. Thus, in October 2006, UNAMI stated that a 'worrying trend of female 'suicides' and 'attempted suicides' as a result of family conflicts were reported in the Kurdistan Region'. UNAMI concluded that in reality the incidents are often crimes committed or incited by the women's own family members on the grounds of 'honour'.<sup>55</sup> The Kurdish National Assembly has recently informed

51 Meeting with women's Organisations of the Halwest Group, Iraqi Civil Development Organization (CDO), 17 January 2007, Sulemanya, Iraq.

52 United Nations Assistance Mission for Iraq (UNAMI), 'Human Rights Report 1 May - 30 June 2006', <http://www.uniraq.org/documents/HR%20Report%20May%20Jun%202006%20EN.pdf>

53 *Iraqi Kurds Amend Law to Reduce Honor Crimes*, AFP, 14 August 2002; UNOCHR, *Occasional Paper: Situation of Women in Iraq*, p. 4.

54 UNAMI, Human Rights Report, 1 May 2006-30 June 2006, p. 11, <<http://www.uniraq.org/documents/HR%20Report%20May%20Jun%202006%20EN.pdf>>, (last accessed 11 April 2007).

55 UNAMI, "Human Rights Report 1 September - 30 October 2006", p. 12 at <<http://www.uniraq.org/documents/HR%20Report%20Sep%20Oct%202006%20EN.pdf>> (last accessed 11 April 2007).

UNAMI that 'fire accidents' are being used to conceal 'honour' crimes, and in December 2006 UNAMI concluded, based on information from a recently published report from the Kurdistan Regional Government's Ministry of Human Rights, that 239 women had burned themselves in the first eight months of 2006. Most of these cases have been investigated as 'accidents' or 'suicide attempts'. However, according to UNAMI, most of the women suffer horrific injuries which are 'unlikely to have been accidentally caused whilst cooking or refuelling heaters', thus suggesting that they have in fact been victims of 'honour-related' crimes.<sup>56</sup>

It has been acknowledged by both KRG government officials and civil society representatives that tribal traditions, a chauvinistic interpretation of Islam and unreasonable societal expectations of women, are some of the root-causes of 'honour' crimes. However, harassment of legal personnel working on domestic violence cases, as well as sympathy from both police and judicial personnel, has significantly hampered efforts to bring perpetrators of 'honour' crimes to justice.<sup>57</sup>

### 3 Access to Justice

#### 3.1 Turkey

Kurdish women in Turkey frequently face barriers when seeking access to justice. Often unable to communicate effectively in Turkish, they are likely to be suspicious of police or security forces because of a fear of further violence.<sup>58</sup> Further, it is often only the educated women who file complaints and start court proceedings<sup>59</sup>, and many are discouraged from taking such steps.

Further, there appears to be a problem in Turkey relating to the investigation of 'suicide' incidents. Professor Yakın Ertürk, the Special Rapporteur of the United Nations Commission on Violence against Women, visited Turkey in May 2006 to investigate the escalating rate in female suicides in the southeast and eastern regions. She found that many senior justice and law enforcement

56 UNAMI, 'Human Rights Report 1 November – 30 December 2006', p. 12, at <<http://www.uniraq.org/FileLib/misc/HR%20Report%20Nov%20Dec%202006%20EN.pdf>> (last accessed 11 April 2007).

57 US Department of State, '2006 Country Report on Human Rights Practices – Iraq', 7 March 2007, <<http://www.state.gov/g/drl/rls/hrrpt/2006/78853.htm>> (last accessed 11 April 2007).

58 Amnesty International (2004), op. cit p.10

59 Interview with Gewer Kadın Derneği, 25 January 2007.

officials reported a number of suspicious suicide cases, or 'accidental' deaths of women which may in fact have been murder. Some of these cases had been referred to courts for prosecution, and there had been at least one conviction. After the visit, Professor Ertürk concluded that 'while the officials indicate that every case of suicide is thoroughly investigated and that the necessary forensic investigations are undertaken, more must be done to identify and resolve cases involving criminal responsibility.'<sup>60</sup> The authorities' frequent failure to thoroughly investigate the violent deaths of women further renders futile any attempt to monitor and record such crimes.

The 1998 Law on the Protection of the Family allows abused spouses and other family members the right to apply for a protective order. The perpetrator can then be forced to leave the family home for a period of up to six months, or be subject to other protective measures. Professor Ertürk found, however, that the law is rarely invoked.<sup>61</sup>

### 3.2 *Iraq*

In the Kurdistan, Iraq, the judiciary suffers from a severe lack of material resources as well as capacity. Few judges have access to professional development training, and other than printed circulars distributed by the Ministry of Justice, there are no systematic resources made available to reference changes.<sup>62</sup> The judiciary is highly susceptible to political influence and tribal influence, though, little evidence suggests that this has been a major difficulty at this time. There are but three women judges in all of Kurdistan. Rural women have great difficulty accessing the formal court system.

In rural areas, women's access to legal assistance is frequently limited to traditional local community leaders that often are not aware of women's rights, and are not inclined to protect them.<sup>63</sup> Especially outside major cities, legal personnel are

60 Ertürk, Y. 'Report of the Special Rapporteur on violence against women, its causes and consequences', OHCHR A/HRC/4/34/Add.2, p.12, <[http://ap.ohchr.org/documents/dpage\\_e.aspx?c=189&su=187.7](http://ap.ohchr.org/documents/dpage_e.aspx?c=189&su=187.7)> (last accessed 8 February 2007).

61 Ertürk, Y. 'Report of the Special Rapporteur on violence against women, its causes and consequences', OHCHR A/HRC/4/34/Add.2, p.17. Found at <[http://ap.ohchr.org/documents/dpage\\_e.aspx?c=189&su=187.7](http://ap.ohchr.org/documents/dpage_e.aspx?c=189&su=187.7)> (last accessed Feb 8, 2007).

62 Judicial Reform Index For Iraq: Kurdistan Supplement, American Bar Association, October 2006.

63 Meeting with women's Organisations of the Halwest Group, Civil Development Organization (CDO), 17 January 2007; Interview with Mullah Mohammed Chamchamal, Sulemanya, Iraq, 2 March 2007; Interview with Mullah Dr. Omar Ghazni, Islamic Union, Erbil, Iraq, 3 March 2007.

unavailable to provide counsel and assistance. There are very limited professional training and development opportunities for defence lawyers to bring them up to date on constitutional mandates and the rights of women guaranteed by law. Furthermore, armed political groups have strategically targeted traditional and customary justice systems throughout rural Kurdistan in an attempt to control local populations.<sup>64</sup> In many instances, these predatory forces have successfully positioned their loyalists within these groups, thus undermining this avenue of justice for women.

Although by law, Iraqi federal law is supreme there are several competing systems of controlling the social order: the state legal codes, the regional legal codes, Islamic religious law (*Shar'ia*) and local customary law. The relative weights of these components vary depending on location and on those charged with interpreting them. Given the problems outlined above with training for judges, and the fact that most of the current laws are new, the authors believe this has allowed for *de facto* rule by tribal custom in areas of personal status for women. Against this background, the legal rights of women continue to represent an area of great uncertainty. Many women detainees in the Social Reform Prison in Sulamanyia seem to be there not for criminal acts but for offences related to domestic violence or family law: refusing to live with abusive husbands or running away from the parental or matrimonial home.

Human rights abuses against women continue to occur with the 'active support or passive complicity of state agencies, armed groups, families and communities'. Decisions taken by informal institutions such as the household or the community that might, in other contexts, be modified or contested through recourse to state laws are, more often than not, underwritten and endorsed by formal institutions such as law enforcement.<sup>65</sup>

The weakness of the judicial system and the gender bias within it has had demonstrably negative consequences for women. Even within the functioning criminal justice system (primarily in urban areas), women are severely under-represented as plaintiffs seeking redress and largely absent as employees. Moreover, the legitimacy of the Regional courts and the independence of the judiciary will continue to be undermined in areas of the country where the *de facto* rule of local leaders persists.

64 Interview with Atta Muhammad, CDO, Sulamanyia, Kurdistan, Iraq, 15 January, 2007.

65 Interview with Soran Qadir Saeed, Program Manager, Norwegian People's Aid, Sulamanyia, Iraq, 16 January 2007.

Continuing insecurity, the use of force as a means of dispute settlement and the dislocation of communities make violence a pervasive social problem. The issue of gender-based violence elicits particular unease in a country where the maintenance of family honour through women's appropriate sexual conduct is considered crucial across all ethnic communities. Sexual violence is considered a taboo subject that may not be spoken of, leading to a failure to investigate crimes against women in the family and community.

#### 4 The importance of local NGO involvement

As has been detailed by this article, the involvement of local women's NGOs is of huge importance for the women living in the Kurdish regions of Turkey and Iraq. In societies traditionally sceptical of women's rights, local women's NGOs often represent the only point of contact for women who have been subjected to domestic violence or 'honour' related crimes. Local women's NGOs are key partners in the process of protecting women's rights, providing not only the best source of statistics on the situation of women in the Kurdish regions of Turkey and Iraq, but also possessing the requisite knowledge and experience, sensitivity and empathy to be able to deal with vulnerable women in providing shelters, counselling and other health and social services to thousands living desperate lives.

In Turkey, however, at present many women's NGOs are struggling to provide services without the necessary state support. Many of the NGOs in the field of women's rights are staffed entirely by volunteers<sup>66</sup> and do not receive any funding from abroad.<sup>67</sup> Moreover, any funding received by NGOs is subject to a high rate of taxation at 22 per cent.<sup>68</sup> Many have experience of harassment by the police in response to peaceful protests against male violence, 'honour' killings, and the non-implementation of domestic and international laws. Project team members were told of examples of brutal repression from state authorities and the tendency of the state to view Kurdish NGOs as agents for terrorism and Kurdish separatism.

As part of the EU accession process, Turkey is required to protect *inter alia* the rights to freedom of association, assembly and expression. International instruments and resolutions, for example CEDAW and UN Security Council

66 Interview with İHD, Van on Monday 22 January 2007.

67 Interview with İHD, Van on Monday 22 January 2007.

68 Ibid.

Resolution 1325 on Women, Peace and Security, also recognise the requirement of states parties to consult and collaborate with civil society organisations in developing appropriate policies to promote and protect the status of women.

In the Kurdish regions of Iraq, the KRG has shown more willingness to promote structures that support abused women, and protect women from further violence, but there is not yet a unified approach in systematically addressing the issues. For example, there have been several shelters that have been opened but most have closed, and the mission found that this was mostly because of lack of strategic planning and awareness of women's rights. Discourse around women's rights is mostly restricted to stopping violence against women, but not about what happens when the violence stops.

Further, NGOs report a lack of understanding amongst the community concerning the very definition of what constitutes violence against women.<sup>69</sup> In a meeting with a group of 10 women's NGOs from across Kurdistan, Iraq, including Mosul and Kirkuk, as well as in its discussions with several individuals working for NGOs, project team members repeatedly heard that women needed shelters that were permanent new homes, and that 'the problem with the shelters is that women have to leave in 1 or 2 years.'<sup>70</sup> It was explained that women must either return to their abusive families or to their parents because adult women, even well educated professional women, are not allowed to live alone, without parental permission.<sup>71</sup> There exist limited instances of organisations assisting women to move to other villages, or to leave the region entirely, but this type of repatriation is rare, and fraught with difficulties.<sup>72</sup> It became clear during the course of the mission that discussion of women's rights had been limited almost exclusively to that of stopping violence, but not about women's rights in their entirety.

## 5 Conclusion

The lives of women living in the Kurdish regions of Turkey and Iraq have long been, and continue to be, dominated by a web of tribal and patriarchal socio-cultural structures, resulting in abuse and discrimination in both the private and public sphere. Cultural, societal, political and economic inequalities leave

69 Interview with Razaw Ahmed Sharif, Heartland Alliance, Sulamanya 2007

70 Meeting with women's Organisations of the Halwest Group, Civil Development Organization (CDO), 17 January 2007

71 Discussion with Baktyar Ahmad, Civil Development Organisation, Erbil 17 January 2007

72 Interview with Razaw Ahmed Sharif, Heartland Alliance, Sulamanya 2007.

women vulnerable, and often local women's NGOs represent the only point of contact for women who have been subjected to discrimination and violence.

In Turkey, despite a comprehensive legal framework of international and European conventions and recent significant achievements to domestic law, heralded by the EU accession process, the rights of women are still not guaranteed. The Turkish state does not consistently and effectively uphold and enforce women's human rights, and deep-rooted tribal and patriarchal cultural structures too often result in significant problems, including domestic abuse, forced marriages, 'honour' related crimes and suicides among women.

In the Kurdish regions of Iraq the KRG has introduced a legal framework granting women more rights and attempting to tackle the issue of 'honour' related crimes. However, lack of sufficient knowledge among the judiciary of this legal framework often results in disparate application with tribal customs taking precedence. Despite attempts by the KRG to address the issue of 'honour' related crimes, it remains a problem in the Kurdish regions of Iraq.

Therefore, though women's rights are enshrined in the legal frameworks of both Turkey and the KRG, much is needed before women living in the Kurdish regions of Turkey and Iraq can fully access their rights to equality, redress and freedom from violence.

## Section 3: Case Summaries and Commentaries



## A. ECHR Case News: Admissibility Decisions and Communicated Cases

### Right to life

#### *Bayram v. Turkey*

(75535/01)

**European Court of Human Rights:** Communicated on 16 March 2007

*Investigation into the death of a conscript soldier – Right to life – Right to a fair trial – Right to an effective investigation – Prohibition of discrimination – Articles 2, 6, 13 and 14*

#### Facts

The applicant, Esat Bayram, is a Turkish national of Kurdish origin who was born in 1973 and lives in Istanbul, Turkey.

The applicant's brother, Halim Bayram, was called up for military service in 1998, and appointed in Çanakkale. During his term of service, he complained to the applicant that he was being bullied by his superior, Hüseyin Arabacı, who had even threatened him with death.

On 7 September 1998, Halim Bayram was posted on sentry duty. He was later found seriously wounded by a bullet. He was taken to hospital and operated on. In the afternoon of the same day, Hüseyin Arabacı called the applicant, who immediately went to see his brother in hospital. Arabacı explained to the Applicant that he had witnessed Halim shooting himself.

However, when the applicant spoke to his brother, he was told that he had been sent for sentry duty, even though his name had not been listed for that day. He remembered having seen Hüseyin Arabacı approaching, and having been worried. He was sure he had not shot himself. Halim also asked to be transferred to Istanbul, and stated that he had written a letter that he had given to the conscript soldier Kazım Ağın.

In the meantime, several witness statements were taken. These stated that Halim had been seen lying on the ground, heavily injured, invoking a certain Emrah. Kazım Ağın stated that Halim had told him that he wanted to commit suicide because the girl he loved was getting married to another man, and had even given him a letter for his parents should anything happen to him. The same day, Kazım Ağın told the applicant that Halim had been strongly pressurised by his superior. The letter in question had been removed from his bag.

The applicant tried to transfer his brother to Istanbul for better medical treatment, but the doctor refused, on the grounds that it was unnecessary as he was recovering quickly. On 14 September 1998, the doctors finally decided to transfer Halim to a hospital in Istanbul but he died during his transfer, due to internal bleeding.

On 15 September 1998, the applicant lodged a petition with the Çanakkale Public Prosecutor's office, requesting an investigation into the circumstances of his brother's death and an autopsy.

The autopsy report of the same day stated that the name Emrah had been carved with a sharp object into Halim's left arm. The applicant, who was present during the examination, further expressed his doubts about suicide as an explanation and requested a second autopsy. On the same day, the Çanakkale Public Prosecutor conducted an examination of the scene of the incident.

The following day, an investigation was opened into Halim's death by the military investigation board, which took a statement from Hüseyin Arabacı on 18 September. The latter denied all the accusations against him and explained that he had immediately called for an ambulance after having seen what happened. The military investigation board delivered its report on 22 September 1998, concluding that no fault could be attributed either to Hüseyin Arabacı, or to the hospital.

In the meantime, on 17 September, a second autopsy was carried out and two pieces of skin were sent for further chemical examination. The Forensic Medicine Institute found that large amounts of nitrite-nitrate ions had been observed on the piece of skin taken from the victim's back. Its medical report of 26 February 1999 concluded that Halim had been shot in the back at close range. In a further report, the physical ballistics expertise branch however stated that there were no

traces of gunfire on the victim's clothes. The Forensic Laboratory Department thus concluded, in its final report dated 21 January 2000, that the bullet had entered through the abdomen.

Meanwhile, on 28 September 1998, the Çanakkale Public Prosecutor delivered a non-jurisdiction decision and transferred the file to the Gölcük Military Prosecutor, and further statements were taken. On 16 November 1998, Emrah Baynal stated before the gendarmes that she and Halim had been in love and that she was not engaged with somebody else. On 9 December 1998, the applicant stated before the military public prosecutor that his brother had been threatened with death by his superior.

On 30 March 2000, the military public prosecutor delivered a non-prosecution decision, against which the applicant appealed. The appeal was further rejected by the Military Court on 9 August 2000.

On 20 July 2001, the applicant received the results of an investigative report by a professor from Forensic Pathology. This concluded that the presence of a small gunshot wound in the back and a large gunshot wound in the abdomen suggested that the bullet had entered the back, which would be confirmed by the presence of nitrite-nitrate ions solely on the skin taken from the back of the body. However, these findings were not consistent with the fact that no traces of gunfire were identified on the clothes, and the conclusion had to be that there was no evidence of whether the entrance wound was in the back or in the front.

### Complaints

The applicant relied on Article 2 of the Convention. He complained that his brother had been shot by his superior during his military service and that no adequate medical care had been provided to him in the Çanakkale hospital. He further alleged that the authorities had failed to conduct an adequate investigation into his brother's death, and did not act with the requisite promptness, since no statement was taken from him when he was able to speak.

The applicant further alleged, under Article 6 of the Convention, that the military authorities had failed to carry out an effective investigation into his brother's death.

The applicant also argued that as a result of the authorities' failure to lead an adequate investigation under Article 2, he had been denied an effective remedy, in violation of Article 13 of the Convention.

The applicant concluded that his brother had been killed because of his Kurdish origins, which amounted to a violation of Article 14.

Communicated under Articles 2, 6, 13 and 14 of the Convention.

### ***Giuliani v. Italy***

(23458/02)

**European Court of Human Rights:** Admissibility decision of 12 March 2007

*Killing of a demonstrator by a member of the armed forces - Right to life - Prohibition of inhuman or degrading treatment - Right to an effective investigation - Articles 2, 3, 6 and 13*

#### Facts

The applicants, Giuliano Giuliani, his wife Adelaide Gaggio and their daughter Elena Giuliani are Italian nationals who were born in 1938, 1944 and 1972 respectively and live in Genoa and Milan, Italy.

The applicants' son and brother, Carlo Giuliani, was killed while taking part in an anti-globalisation demonstration in connection with the G8 summit held in Genoa from 19 to 21 July 2001. In the context of this summit, numerous anti-globalisation demonstrations were held in the city and substantial security arrangements were put in place by the Italian authorities, including deployment of the armed forces.

On 20 July 2001, an authorised demonstration gave rise to violent clashes between the numerous demonstrators and the security forces. In the late afternoon, a group of about 50 *carabinieri* withdrew near Piazza Alimonda. Two jeeps which had been bringing up the rear were left isolated. Following a driver error, one of the vehicles remained on the Piazza, unable to move.

Objects, mainly stones, were then thrown at the vehicle and demonstrators ran towards it. One of the *carabinieri* who was inside the vehicle pointed his weapon outside the vehicle, shouting to the crowd to leave, and firing two shots. Carlo Giuliani, who had just picked up a fire extinguisher, was a few metres away from the jeep; the first bullet hit him and he fell to the ground. In an attempt to move

the jeep out of the Piazza, the driver reversed over Carlo Giuliani's body and then drove over him once more. The demonstrators were dispersed. A doctor arrived at the scene and pronounced Carlo Giuliani's death.

An investigation was opened immediately by the Italian authorities, in the course of which statements were taken from the three *carabinieri* in the jeep and evidence was heard from other *carabinieri* and from some of the demonstrators. Criminal proceedings were instituted against the officer who had fired the shots and the driver of the jeep for intentional homicide. The autopsy performed on Carlo's body revealed that the bullet impact to his head had been sufficient to cause death within a few minutes, whereas the jeep's driving over his body had resulted only in minor injuries. The forensic expert found that the shot had been fired at a downward angle.

At the public prosecutor's request three expert reports were prepared. The authors of the third report, submitted in June 2002, deplored the fact that they had been unable to examine Carlo's body. They concluded that the bullet had been fired upwards by the officer but had been deflected by a stone thrown at the jeep by another demonstrator, before striking Carlo Giuliani.

On 5 May 2003 the investigating judge discontinued the proceedings. She held that the driver of the jeep could not be held responsible for the killing as he had been unable to see Carlo Giuliani, given the confusion prevailing around the vehicle. As to the officer who had fired the fatal shot, the judge held that he had fired into the air but that the bullet had been deflected by a stone, causing it to strike Carlo. The judge concluded that the *carabinieri* had made legitimate use of his weapon and had acted in self defence in response to a violent attack on the jeep.

### Complaints

Relying on Article 2 of the Convention, the applicants alleged that Carlo's death was caused by excessive use of force by the authorities and that the organisation of the operations to maintain and restore public order was inadequate. They also complained under the same Article about the absence of effective investigation into their relative's death.

The applicants further argued that the failure of the authorities to lend immediate assistance to Carlo Giuliani after he collapsed and after the jeep drove over his

body amounted to a violation of Articles 2 and 3.

They applicants also complained that there was no effective investigation, particularly as no evidence was taken from certain witnesses or from the senior police officers concerned. They also contend that one of the experts appointed by the public prosecutor's office published an article shortly before his appointment in which he supported the self-defence argument. Finally, despite the fact that the investigation concerned two *carabinieri*, several investigative measures were entrusted to the *carabinieri*. The applicants relied on Articles 6 and 13 as to the non conformity of the investigation with these Article's requirements.

#### Held

The Court considered that the complaints under Articles 2, 3, 6 and 13 raised serious issues of fact and law under the Convention, whose determination required an examination of the merits. Accordingly, the Court declared the application admissible.

## **Prohibition of torture or inhuman & degrading treatment**

### ***Harutyunyan v. Armenia***

(34334/04)

**European Court of Human Rights:** Partial admissibility decision of 7 December 2006

*Lack of medical assistance while in detention - Placement in an iron cage during criminal proceedings - Prohibition of inhuman or degrading treatment - Right to a fair trial - Article 3 and Article 6, and Article 4 of Protocol No. 7*

#### Facts

The applicant, Ashot Harutyunyan, is an Armenian national who was born in 1952 and lives in Yerevan, Armenia.

On 29 November 2001, criminal proceedings were launched against him on account of fraudulent acquisition of property and falsification of documents. On 29 May 2002, the investigating authority decided to end the proceedings due to the lack of *corpus delicti*. On 26 June 2002 the Yerevan City Prosecutor quashed

the decision and reopened the investigation.

On 14 March 2003, the applicant was charged with the above offences and a new charge of tax evasion. On 6 May 2003, the Kentron and Nork-Marash District Court of Yerevan decided to remand the applicant in custody, who was placed in Nubarashen Detention Facility.

On 20 June 2003 the applicant was examined by a surgeon after having complained of pain in the epigastric region. An acute bleeding duodenal ulcer was diagnosed, and it was recommended he undergo surgery, which he agreed to do in writing. On 26 June 2003, he was transferred to the Hospital for Prisoners where, according to the Government, he underwent surgery, this being contested by the applicant. A discharge summary stated that the applicant had received haemostatic therapy to the ulcer and was discharged on 29 July 2003.

One week later, the applicant was transferred for medical examination. He was under regular medical observation and treatment from 11 to 29 August. On 9 September 2003 the applicant's counsel applied to the Head of the Criminal Corrections Unit of the Ministry of Justice, requesting that the applicant be transferred for treatment to the Hospital for Prisoners. The applicant was however transferred back to the detention facility. According to him, from this date until his transfer to a correctional facility on 13 August 2004, he was never examined by a doctor, despite his numerous verbal applications requesting medical assistance. The Government alleged that such assistance had always been provided, including necessary medicines and diet, and that he was moreover regularly checked by a doctor.

On 27 January 2004, the court found the applicant guilty as charged and sentenced him to seven years in prison. The court fully granted the victim's civil claim for damages, basing its judgment on relevant expert opinions, various documents and statements of witnesses and experts. On 10 February 2004 the applicant's defence counsel lodged an appeal with the Criminal and Military Court of Appeal. The applicant also submitted written explanations, and requested that the Court of Appeal further call and examine specific witnesses.

On 9 February 2004, the applicant was issued a certificate stating that he had been found to be fit for work after having been examined by a doctor. In June and July 2004, the applicant's counsel applied to the Chief of Nubarashen Detention Facility and to the Head of the Criminal Corrections Unit of the Ministry of Justice, complaining that the applicant, in spite of his state of health, had been

recently transferred to a common cell, in bad conditions, and requesting that he be transferred to a hospital for treatment.

On 19 March 2004 the Criminal and Military Court of Appeal held its first hearing. In the proceedings, the applicant was placed in an iron cage which measured about 3 sq. m. The applicant's defence counsel requested the court to release the applicant from the cage, which was refused. At a further hearing, the applicant repeated his request to call witnesses. The Court of Appeal refused it on the ground that two of them had already made detailed statements, the testimony of a third was unnecessary and the remaining three were unidentifiable by the court.

On 25 May 2004 the Criminal and Military Court of Appeal upheld the sentence imposed on the applicant. The court only partially granted the victim's civil claim and reduced the amount of compensation. In its judgment, the Court of Appeal referred in detail to the relevant expert opinions and rejected the applicant's request for additional expert opinion. On 30 July 2004 the Criminal and Military Chamber of the Court of Cassation dismissed the applicant's counsel's appeal and upheld the conviction. The applicant submits that he requested the Court of Cassation to allow him to be present at this hearing but this request was refused.

On 27 July 2004, at 1.20 a.m., an ambulance was called to the detention facility as the applicant had suffered a heart attack. The following day, the applicant's counsel re-lodged the complaint. On 29 July, the Head of the Criminal Corrections Unit replied that the applicant was under medical observation and his state of health was satisfactory.

On 11 and 12 August 2004 the applicant's counsel lodged two complaints with the Head of the Criminal Corrections Unit and with the Minister of Justice, with a copy to the Chief of Nubarashen Detention Facility, claiming that although the applicant's state of health was deteriorating day by day, no measures were being taken. Yet the applicant's illnesses required treatment and regular medical check-ups.

On 13 August 2004, following his conviction, the applicant was transferred to a correctional facility to serve his sentence. In the meantime, the applicant's counsel requested the Malatia-Sebastia District Court of Yerevan, in charge of the criminal case, to order an additional accounting expert opinion. The court refused it on the ground that there was sufficient evidence in the case file.

### Complaints

The applicant complained under Article 3 of the Convention that his placement in an iron cage during the proceedings in the Criminal and Military Court of Appeal, in front of his relatives and the public, amounted to degrading treatment.

He further complained under the same head about the lack of requisite medical assistance while in detention, during which time he was suffering from a number of diseases.

The applicant made several complaints under Article 6(1) of the Convention. Firstly, he argued that the Chairman of the Criminal and Military Chamber of the Court of Cassation was not impartial, as his son was an investigator at the Yerevan City Prosecutor's Office where the case was investigated. He also alleged that the victim's civil claim for damages had been granted in an excessive amount by the courts, which also failed to give reasons for the harsh sentence imposed. Furthermore, he complained had not been allowed to be present at the hearing of the Court of Cassation. Finally, he raised concerns that the proceedings were not conducted within a reasonable time.

The applicant also complained under Article 6(1) and (2) of the Convention that the principles of equality of arms and of the presumption of innocence had been violated by his placement in an iron cage during the proceedings in the Criminal and Military Court of Appeal.

The applicant complained under Article 6(3)(b) of the Convention that he did not have the chance to properly build his defence since the courts rejected his requests to order additional expert opinions.

He further complained under Article 6(3)(d) of the Convention that the Court of Appeal had rejected his request to call witnesses. He further alleged that the law itself failed to guarantee equality between the parties since the prosecution was free to choose its witnesses, while the accused was obliged to seek prior permission by the court.

The applicant concluded, relying on Article 4 of Protocol No. 7 that he was prosecuted twice, since the investigator's decision of 29 May 2002 discontinuing the criminal proceedings against him was set aside and the proceedings were reopened by the Yerevan City Prosecutor's Office.

### Held

The Court unanimously decided to adjourn the examination of the applicant's complaints concerning his placement in an iron cage during the proceedings in the Criminal and Military Court of Appeal, the alleged lack of requisite medical assistance in detention, and the alleged violation of his right to call and examine witnesses. The Court considered that it could not, on the basis of the file, determine the admissibility of this part of the application and that it was therefore necessary, in accordance with Rule 54 (2)(b) of the Rules of the Court, to give notice of this complaint to the respondent Government.

The Court found that the fact the Chairman had a relative working in the relevant prosecutor's office, who had no apparent involvement in the applicant's particular trial, could not be regarded as a feature casting doubt on his impartiality as far as the said trial was concerned. As the hearing before the Court of Cassation was held in the presence of the applicant's defence counsel, the applicant's absence from the hearing before the Court of Cassation did not violate his right to a public hearing. Furthermore, the principle of equality of arms was not violated by the prosecutor's or the civil plaintiff's attendance since the applicant's defence counsel was present at this hearing. The Court did not consider that a trial of two years and eight months violated the "reasonable time" requirement contained in Article 6(1) of the Convention. In addition, the fact that the criminal proceedings against the applicant were at some point discontinued but later resumed could not be regarded as double jeopardy within the meaning of Article 4 of Protocol No. 7.

The Court therefore declared the remainder of the application inadmissible as manifestly ill-founded under Article 35(3) and (4) of the Convention.

### ***Sabanchiyeva v. Russia***

(38450/05)

**European Court of Human Rights:** Communicated December 2006

*Refusal to return bodies of alleged terrorists for burial – Prohibition of inhuman or degrading treatment – Violation of private and family life – Right to manifest religion or belief - Articles 3, 6, 8, 9 and 13*

### Facts

The applicant, Ms Sabanchiyeva, is a Russian national.

On 13 October 2005, the law-enforcement agencies of Nalchik, the capital of the Kabardino-Balkar Republic (Russian Federation), were attacked by armed insurgents. The fighting lasted two days and left more than a hundred dead, the majority of whom were assailants. Among them was a relative of the applicant.

According to the applicant, the bodies were piled up and stripped naked. They decomposed due to the lack of adequate refrigeration.

The authorities refused to respond to the requests of the relatives asking for the corpses' return for burial, until an investigation into the case was completed. They relied on Russian legislation introduced in October 2002, after the terrorist attack on the Nord-Ost Theatre in Moscow, which prohibited the handing over of bodies of alleged terrorists to their relatives and the disclosure of their place of burial.

#### Complaints

The applicant complained that the authorities' refusal to return the corpse of her relative amounted to inhuman or degrading treatment, in violation of Article 3 of the Convention.

She further complained about the violation of her private and family life in relation to the non-return of her relative's body. She relied on Article 8 of the Convention.

She also argued under Article 9 of the Convention that the authorities had violated her right to manifest religion or belief, as they had refused to return the body for burial, in accordance with her religious beliefs.

The applicant also brought complaints under Articles 6 and 13 in relation to her right to a challenge the non-return of her relative's body.

Communicated under Articles 3, 6, 8, 9 and 13 of the Convention.

### ***Ismoilov and Others v. Russia***

(2974/06)

**European Court of Human Rights:** Communicated December 2006

*Impending extradition of detainees to Uzbekistan, alleged risks of ill-treatment and unfair trial– Right to liberty and security - Presumption of innocence - Articles 3,*

5, 6 and 13

### Facts

The applicants are thirteen detainees of Uzbek nationality, who are detained in Russia with a view to their extradition to their native country. They are all Muslims.

One of the applicants had been arrested in Uzbekistan in 2000 by national security agents, who allegedly tortured him, threatened to rape his wife and attempted to extract a confession from him that he was planning a coup. He was further convicted for having distributed Islamic leaflets. In February 2005, the Uzbek prosecution authorities charged him with criminal conspiracy, attempt to overthrow the constitutional order of Uzbekistan, membership of an illegal organisation and possession and distribution of subversive literature.

The majority of the applicants had left for Russia before 13 May 2005, when the Uzbek authorities forcibly quelled a demonstration in Andijan. They claimed that they were not involved in those demonstrations. Moreover, they claimed not to belong to any political or religious organisation.

However, after the Andijan events, they were charged with membership of extremist organisations, financing terrorist activities, attempting to violently overthrow the constitutional order of Uzbekistan, aggravated murder and organising the Andijan mass disorder. Some of them were also charged with involvement in subversive activities, illegal possession of arms, and dissemination of materials threatening public security and public order.

In June 2005, the applicants were arrested in Russia. They were further questioned by Uzbek national security agents. In July 2005, the Prosecutor-General of Uzbekistan requested their extradition, guaranteeing that they would not be extradited without Russia's consent, nor prosecuted or punished for any offences which were not mentioned in the extradition request. He later provided an assurance that the applicants would not be subjected to death penalty, torture, violence or other forms of inhuman or degrading treatment. He further guaranteed that defence rights would be respected. He assured the Russian authorities that the Uzbek authorities would not discriminate the applicants but solely prosecute them on the charges against them.

The Russian local prosecutor carried out an inquiry and established that, apart from one of them, none of the applicants had left Russia in May 2005. In July

2005, the Russian district courts ordered the applicants' detention pending extradition on the basis of Articles 108 and 466 of the Russian Code of Criminal Procedure. The courts held that it was not possible to apply a more lenient preventive measure and set no time-limit for the applicant's detention.

In August 2005, the applicants applied for refugee status in Russia. They alleged that the charges against them lacked legal or factual basis and that the prosecution against them was arbitrary. In January 2006, the United Nations High Commissioner for Refugees supported the applicants' applications, but those were nonetheless rejected. The refusals were upheld by a district court, in June 2006. However, in July 2006, the UNHCR granted the applicants mandate refugee status.

In August 2006, the extradition of the applicants was ordered, and upheld by a regional court. The applicants appealed the decision. The proceedings are still pending before the domestic courts.

#### Complaints

The applicants complained that if they were extradited to their country of origin, they would face a risk of ill-treatment and unfair trial. They relied on Articles 3 and 6(1) of the Convention.

The applicants further argued that their detention was unlawful, as the orders on which it was based did not set any time-limit for their release. They relied on Article 5(1) of the Convention.

They moreover complained that the domestic courts had refused to examine their complaints as regards their detention, in violation of Article 5(4) and 13 of the Convention.

The applicants finally claimed that the Russian Deputy Prosecutor who had processed the request for their extradition had stated that they had committed certain offences in Uzbekistan, which they contested. They relied on Article 6(2).

Communicated under Articles 3, 5, 6 and 13. Pursuant to Rule 39 of the Rules of the Court, the Court also indicated to the respondent Government that the applicants should not be extradited until further notice.

## Right of assembly and association

### *Artyomov v. Russia*

(17582/05)

**European Court of Human Rights:** Admissibility decision of 7 December 2006

*Refusal of registration of a political party based on ethnic affiliation - Freedom of assembly and association – Article 11 of the Convention and Protocol No.12*

The applicant, Mr Igor Vladimirovich Artyomov, is a Russian national who was born in 1962 and lives in Vladimir, Russia. He is the leader of the public movement “Russian All-Nation Union”, which was registered as a public association by the Ministry of Justice in December 1998.

On 23 December 2001, the members of the movement decided to re-organise it into a political party bearing the same name. An application for the party’s registration was lodged with the Ministry of Justice. By letter of 28 June 2002, the Ministry of Justice refused the application, among others on the ground that the adjective “Russian” (*russkiy*) in the name of the party referred to an ethnic group, which was contrary to section 9(3) of the Political Parties Act prohibiting the establishment of political parties based on religious or ethnic affiliation. The applicant contested the decision before the Taganskiy District Court of Moscow.

On 24 January 2003, the court dismissed the applicant’s complaint after having heard evidence from several experts, who concurred that the meaning of the word *russkiy* was ambiguous, since it could be understood either as denoting anything related to Russia – like the word *rossiyskiy* – or as referring to the ethnic Russians. Moreover, the word “all-nation” could also be interpreted, either as “an association of people belonging to different nations” or as “an association of the people of one nation”. The association of these two words had to be interpreted as referring to “an association of the nation of [ethnic] Russians”. The Court accepted that interpretation, which was not disputed by the applicant, and concluded that the party was founded on the basis of ethnic affiliation, which amounted to a breach of section 9(3) of the Political Parties Act. On 18 September 2003 the Moscow City Court upheld the judgment on appeal.

The applicant then challenged section 9(3) of the Political Parties Act before the Constitutional Court, alleging that it was incompatible with the Russian

Constitution. On 15 December 2004 the Court issued Ruling no. 18-P, noting that in multinational and multi-denominational Russia, public consciousness was likely to identify the term ‘Russian’ with specific denomination or ethnic group, rather than with a system of values common to the Russian (*rossiyskiy*) people. The Court then held that the constitutional principle of a democratic and secular state, as applied in the particular social and historic context of the Russian Federation, did not allow political parties to be established on the basis of ethnic or religious affiliation. The Court concluded that it was not competent to determine whether a party’s name reflected its aims, namely the promotion of ethnic or religious interests, this assessment coming within the jurisdiction of the ordinary courts.

### Complaints

The applicant complained about the domestic authorities’ refusal to grant registration to his political party. He relied on Article 11 of the Convention

He further complained, under Protocol No.12 to the Convention, that the domestic legislation precluded groups based on ethnic or religious affiliation from participating as such in the political life of the country.

### Held

The Court rejected the complaint under Article 11 as manifestly ill-founded.

The Court further rejected the complaint under Protocol No. 12 as incompatible *ratione personae* with the provisions of the Convention, since the Russian Federation had not ratified it and was accordingly not bound by its provisions.

The Court recalled that the legal status or activities of the public movement “Russian All-National Union” had not been affected by the refusal to register it as a party. It therefore did not appear that the refusal to register the political party deprived the applicant of a possibility of pursuing the aims which the party would have harboured and thus of exercising his right to freedom of association.

For the purposes of analysis, the Court nevertheless assumed that the refusal to register the political party amounted to an interference with the applicant’s right to freedom of association. However, the interference was based on section 9(3) of the Political Parties Act; the Court was therefore satisfied that it was “prescribed by law”. The Court further noted that the Russian Constitutional Court had founded its decision on the conviction that the establishment of parties based on ethnic or religious affiliation would imperil the peaceful co-existence of nations

and religions in the Russian Federation and would undermine the principles of a secular state and equality before the law. Having regard to the context, the Court accepted that the interference pursued legitimate aims of preventing disorder and protecting the rights and freedoms of others. The Court further held that the interference was “necessary in a democratic society”, since there had been a “pressing social need” to take the impugned measure, and since this measure was proportionate to the legitimate aims pursued.

The Court concluded that the authorities had not prevented the applicant from forming an association to express and promote the specific aims embraced by it, but from creating a legal entity which would have become entitled to stand for election. Given that the refusal to register the applicant’s political party could be regarded as having been “necessary in a democratic society” within the meaning of Article 11(2) of the Convention, there had been no violation of Article 11.

### ***Öcalan v. Turkey***

(24069/03, 197/04, 6201/06, 10464/07)

**European Court of Human Rights:** Communicated on 3 April 2007.

*Social isolation and alleged poisoning while in detention – Right to life - Prohibition of inhuman and degrading treatment – Right to a fair trial – No punishment without law - Right to respect for private and family life – Articles 2, 3, 5, 6, 7, 8, 13, 14 and 34 of the Convention*

#### Facts

The applicant, Abdullah Öcalan, is a Turkish national of Kurdish origin who was born in 1949, and is currently detained in İmralı prison (Mudanya, Bursa, Turkey).

The facts of the case until 12 May 2005 were established by the Court in its judgment *Öcalan v Turkey* of the same day. On 15 February 1999, the applicant was arrested in Kenya. He was brought back to Turkey and held in custody in İmralı prison, whose remaining prisoners had been transferred elsewhere. On 29 June 1999, he was declared guilty of having led actions aimed at the secession of a part of the Turkish territory and of having trained and led armed terrorists (the Kurdistan Workers’ Party or PKK). He was sentenced to death. On 3 October 2002, the Ankara State Security Court changed the applicant’s death penalty to life imprisonment.

On 1 June 2005, the applicant was visited by his lawyers. Just before the interview, the prison authorities told the applicant and his lawyers of a decision taken by the judge responsible for the execution of sentences of Bursa, applying Article 5 of the new Law No.5275 to this visit. Due to this law, a state agent was present during the interview, the conversation of the applicant and his lawyers was registered with a dictaphone, and the lawyers' documents were submitted for the judge's examination. Subsequent visits were conducted in the same fashion. The applicant's lawyers appealed these measures unsuccessfully before the Bursa Assize Court.

On 7 June 2005, in accordance with the New Code of Criminal Procedure, twelve of the applicant's lawyers were prohibited from representing him, since they were the subject of criminal proceedings for crimes related to terrorism. The applicant's appeal was rejected.

On 30 November 2005, the applicant expressed to his lawyers his views on the way citizens of Kurdish origin could claim their right to education. The Disciplinary Council of the Prison then sentenced him with 20 days solitary confinement for "training and propaganda activities within a criminal organisation". His objection was rejected.

On 29 March 2006, a state agent interrupted a further interview, on the ground that it did not limit itself to the preparation of the applicant's defence. The applicant's lawyers lodged a complaint for abuse of power against him, which was dismissed. They further lodged an appeal before the Bursa Assize Court. The proceedings are still pending.

Additionally, many of the lawyers' requests for visit were rejected because of the incapacity of the boats to travel to the island in bad weather conditions. As a result, the applicant did not see them for three or four consecutive weeks.

The applicant is the only detainee of the prison. His access to the press is strongly restricted, and the newspapers to which he has access are largely censored, as is his mail. His outing time is restricted to half an hour per day. He was denied permission to pass from his cell to a neighbouring room, despite the recommendations of the European Committee for the Prevention of Torture. The visits of the applicant's relatives, who are forbidden to speak Kurdish, are strongly restricted. They are often hindered by the inadequate means of transport.

Moreover, by a letter dated 7 March 2007, the applicant's representatives informed

the Court that they had asked a medical laboratory in Strasbourg to analyse six strands of hair belonging to the applicant and that the result of the analysis carried out on 5 February 2007 had indicated abnormal doses of chromium and strontium.

### Complaints

The applicant complained under Article 3 and alternatively Article 8 that his detention conditions were inhuman. He further argued under Article 3 that his sentence to life imprisonment without any possibility of release created a feeling of anguish disproportionate to the charges against him.

He then maintained that his life imprisonment sentence without any possibility of release, combined with the social isolation imposed on him, amounted to a violation of Article 3 or Article 8.

He further complained that the social isolation imposed on him was not foreseen by any legislative provision, in violation of Articles 6 and 7 of the Convention.

He also alleged that the transformation of his death sentence into a life imprisonment without any possibility of release infringed Article 7, since the legislation according to which he remained in detention had been changed prior to his conviction from a maximum of 36 years to life imprisonment.

Invoking Article 5(4), he argued that he did not have any possibility to appeal the social isolation imposed on him.

The applicant also complained under Article 6 about the intervention in the confidentiality of his interview with his lawyers, and the prohibition on the exchange of documents between them.

He further claims a violation of Article 8, since he could not be examined by independent doctors, sustained disproportionate difficulties as regards his relatives' visits and was not permitted uncensored correspondence with his family.

Invoking Article 13, he complained about the lack of access to effective remedies against the decisions taken by the judicial authorities of Bursa.

The applicant also complained under Article 14 that he was the victim of discrimination because of his Kurdish origin and of his political opinions.

Relying on the medical analysis carried out in Strasbourg, the applicant's representatives alleged that their client was being poisoned. They claimed violations of Articles 2, 3 and 8 in this respect.

Communicated under Articles 2, 3, 5, 6, 7, 8, 13, 14 and 34 of the Convention.

## **B. Substantive ECHR Cases**

### **Right to life**

#### ***Paşa and Erkan Erol v. Turkey***

(51358/99)

**European Court of Human Rights:** Judgment of 12 December 2006

*Anti-personnel landmines – Right to life – Articles 2, 6(1) and 13*

#### Facts

The applicants, Paşa Erol and his son Erkan Erol, are Turkish nationals who were born in 1943 and 1986 respectively, and live in Tunceli, Turkey.

On 11 March 1995, Paşa Erol, in his capacity as mayor, was informed that some anti-personnel landmines were to be buried along one side of the premises of the Akdemir gendarmerie, in the district of Pertek, Tunceli. The area was surrounded by barbed wire at waist level, and some warning signs were placed every 20 meters. In the following days, the inhabitants of the village were orally informed, several times, that the area that they used as a pastureland had been mined.

On 11 May 1995, Erkan Erol, aged 9, was grazing sheep with his friends. The animals entered the mined zone and were followed by the children, who crossed the barbed wires. The applicant, attracted by a metallic object, was wounded in the explosion of what turned to be an anti-personnel landmine. He was brought by military helicopter to the civil hospital of Elazığ, where his left leg was amputated and replaced by a prosthetic limb. The other children were evacuated by military helicopter in a rescue operation. Some of them had been slightly injured in the explosion.

Following the incident, some inhabitants, the mayor, the children and their

parents were heard by the gendarmes. They confirmed having been warned, and for the parents, having forbidden their children to enter the area. The mayor further confessed to having already entered it with his animals, and recognised his negligence.

On 10 April 1996, Paşa Erol sought compensation before the Ministry of Interior, regarding the lack of safety measures around the military zone. On 9 July 1996, he brought proceedings against the Ministry before the administrative court of Malatya, referring to the objective responsibility of the State.

On 2 April 1997, his claim was rejected by the Court, on the ground that, in light of the available evidence, safety measures had effectively been taken regarding the mined area. The applicant had entered a prohibited area and was thus responsible for the accident. The father was also responsible for his own negligence.

On 24 November 1998, the Supreme Administrative Court upheld the judgment on the basis that the objective responsibility of the State stopped being engaged when the matter fell to the personal responsibility of the person involved. Its final judgment was notified to the applicants on 19 March 1999.

### Complaints

The applicants argued that the state had failed in its duty to protect the right to life to its citizens, in authorising the burial of anti-personnel landmines without taking all necessary related security measures. They relied on Article 2.

Relying on Article 6(1), they further alleged that their claim had been rejected in the absence of any effective investigation into their allegations.

Finally, they also held that their administrative appeal had been ineffective, in violation of Article 13.

### Held

The Court declared the first claim inadmissible in relation to the first applicant. The Court nevertheless held that Article 2 had been violated in its substance, regarding the injury of Erkan Erol.

The Court held that there had been no violation of Articles 6 § 1 and 13.

The Court awarded the second applicant EUR 30,505 for pecuniary and non-pecuniary damages, and EUR 1,076 for costs and expenses.

### Commentary

The Government raised an inadmissibility argument in relation to the first applicant's claim under Article 2, alleging that he could not be considered a victim under Article 34 since, as a father and as a mayor, he had both an administrative and a parental responsibility in his son's accident. The Court upheld this argument and rejected this complaint as manifestly ill-founded.

The Government further contested the applicability of Article 2, as no criminal proceedings had been launched against the military authorities by the applicant: he had simply requested damages. The Court rejected this argument, holding that an infringement of the positive obligation of the state to take any measures necessary to the protection of life of persons under its jurisdiction did not require criminal proceedings to be launched. Further, the Court was not convinced that the Government had taken all necessary measures to ensure protection from the risk of death or injury and therefore concluded that they failed to uphold their positive obligation under Article 2, in respect of the second applicant.

The Court noted that the anti-personnel landmines were particularly dangerous, notably for children, and that their use had been widely condemned by international opinion and prohibited under the Ottawa Convention<sup>1</sup>, which Turkey had signed in 2003. The Court further noted that, in the present case, the village pastureland had been mined. Having regard to the specific situation of the area, significant safety measures were necessary and where the gendarmerie failed to provide other means of protection, the authorities should take any necessary measures to prevent civilians from entering the area.

Having examined the evidence submitted by the Government, the Court noticed that security measures had not been sufficient to ensure effective protection, as, for example, the two rows of barbed wires had been too far apart and easy for children to cross over.

Finally, even though the parents had forbidden their children to enter the mined zone, the children could not have been expected, in this very rural community, to have behaved in the same way as responsible adults when faced with such dangers. As a result, the Court found a violation of Article 2 of the Convention.

1 The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on Their Destruction

## ***Tarariyeva v. Russia***

(4353/03)

**European Court of Human Rights:** Judgment of 14 December 2006

*Death of a convict suffering from serious illnesses – Right to life – Prohibition of inhuman or degrading treatment – Right to an effective remedy – Articles 2, 3, 13 and 34*

### Facts

The applicant, Nadezhda Dmitriyevna Tarariyeva, is a Russian national who was born in 1946 and lives in the Krasnodar Region, Russia.

On 6 April 2000, her son Nikolay Ivanovich Tarariyev, who was born in 1976, was convicted of murder and sentenced to six years' imprisonment in a correctional colony. The Krasnodar Regional Court upheld the conviction. Mr Tarariyev was sent to a correctional facility in the town of Khadyzhensk.

In January 2001, he was diagnosed with an acute ulcer condition and a chronic gastroduodenitis, and given treatment. On 2 August 2001, the Presidium of the Krasnodar Regional Court quashed the judgments under the supervisory review procedure and remitted the case for a new trial. Mr Tarariyev was transferred to the Krasnodar remand centre.

On 20 February 2002, he fainted in the court room. The court ordered a medical examination. On 22 February 2002, the Afinskiy district hospital sent a report to the court, recommending that Mr Tarariyev, who was undergoing treatment in connection with severe health conditions, should remain in hospital for no fewer than two weeks. However, Mr Tarariyev was discharged from the hospital to the Krasnodar SIZO (pre-trial detention facility) on 1 March. On 6 March, he sought medical assistance and received out-patient treatment.

On 19 April 2002, the Severskiy District Court pronounced a new conviction against Mr Tarariyev and sentenced him to six years' imprisonment in a correctional colony. The Krasnodar Regional Court further upheld the conviction. Mr Tarariyev was then transferred to the Khadyzhensk colony. According to the applicant, upon his arrival all medicines were taken away from him and no medical assistance was provided.

On 20 August 2002 Mr Tarariyev complained of acute pain. He was diagnosed with a perforated duodenal ulcer and was transferred to the Apsheronsk Central

District Hospital, where he underwent surgery. On 21 and 22 August, after having visited her son, the applicant complained to various officials about his handcuffing to the hospital bed. In support of her allegations, she produced a written affidavit by a friend of hers, Ms T., who had also come to visit on 21 August.

On 22 August 2002, Mr Tarariyev was diagnosed with a breakdown of sutures in the duodenum, duodenal fistula and peritonitis. He was transported to the prison hospital, 120 km from Apsheronk. According to the Government, Mr Tarariyev was transported by a “special car” accompanied by an experienced medical nurse who carried a set of necessary medical equipment on her. According to the applicant, she had objected to it but the head of the resuscitation department had told her that the transfer was mandatory because Mr Tarariyev was a convict.

On 4 September 2002 the applicant learnt that her son had died that morning. He had undergone further surgery at the prison hospital two weeks earlier. The autopsy established that the death had been caused by acute blood loss provoked by massive gastrointestinal haemorrhaging.

On 19 February 2003, the Apsheronk district prosecutor issued a decision to initiate a criminal investigation into the actions of doctors of Apsheronk Hospital. The investigator further ordered a medical inquiry into the circumstances of Mr Tarariyev’s treatment and death. In the meantime, on 1 April 2003, the applicant was granted victim status.

On 21 May 2003, charges were brought against the doctors of Apsheronk Hospital and the prison hospital, on the basis of the final expert report. On 3 June 2003, the case against the doctors of the prison hospital was severed and referred for investigation to the Krasnodar Regional Prosecutor.

On 4 June 2003, the applicant asked the Apsheronk district prosecutor to put additional questions to medical experts concerning the responsibility of the Khadyzhensk colony personnel. She did not receive any response to her request.

On 6 June 2003 an investigator of the Apsheronk district prosecutor’s office commissioned a supplementary medical expert examination. Despite the conclusions of the expert report, the senior assistant to the Adygheya Republic prosecutor refused to initiate criminal proceedings against doctors of the prison hospital on the grounds that the alleged offence had not been committed, on the

basis of doctors' statements.

On 10 July 2003 the investigator closed the criminal case against all the other doctors of the Apsheronk hospital preferring to make criminal charges against the head of the surgery department, who was further acquitted for lack of evidence. The judgment was silent on the applicant's civil claim. Both the applicant and the prosecution appealed. On 10 December 2003, the Krasnodar Regional Court upheld the acquittal.

On 5 November 2003, the Adygheya Republic prosecutor's office reported to the applicant that an additional inquiry into the actions of the staff of the prison hospital had been carried out further to her complaint, and that no negligence was established. Further, on 27 January and 2 March 2004, the Prosecutor General's Office stated that as objective inquiries had been carried out, there were no grounds to quash the decision.

On 5 December 2005 the applicant complained to the Court that on 1 and 2 December the regional prosecutor's office had formally questioned Ms T. about the events described in her affidavit, intimidating her. On 13 January 2006 the Government acknowledged that Ms T. had been summoned to the Severskiy district prosecutor's office for the purpose of verifying the applicant's complaint to the Court. The Government claimed that Ms T. had been merely asked to "give explanations" in accordance with the Public Prosecutors Act. They stated that no pressure had been exerted on her and that her rights had been explained to her.

### Complaints

The applicant claimed that the death in custody of her son was the result of inadequate and defective medical assistance, in violation of Article 2.

She further complained, under the same head and under Article 13 of the Convention, that those responsible for her son's death had not been identified and punished.

Relying on Article 3, the applicant argued that the lack of medicines during her son's detention at the Khadyzhensk colony, his handcuffing at Apsheronk Hospital and the conditions of his transport from Apsheronk Hospital to the prison hospital amounted to inhuman and degrading treatment.

The applicant further complained that her witness, Ms T., had been summoned to the prosecutor's office and interviewed in connection with her application to

the Court, in violation of Article 34 of the Convention.

#### Held

The Court held that there had been a violation of Article 2 as the Russian authorities had failed to protect the applicant's son's right to life.

It further held that there had been a violation of Article 2 as the Russian authorities had failed to determine the cause of death of the applicant's son and to bring those responsible to account.

The Court considered that no separate examination of the same issue from the standpoint of Article 13 was necessary.

The Court considered that in view of its findings related to Article 2, it was not necessary to examine the complaint about the medical conditions of detention from the standpoint of Article 3.

The Court did however find that Article 3 had been violated on account of the applicant's son's handcuffing, as the use of restraints in these conditions was disproportionate to the needs of security and amounted to inhuman treatment. The Court also found a violation of Article 3 on account of the conditions of transport of the applicant's son from the civilian to the prison hospital.

The Court finally held, by six votes to one, that there was no violation of Article 34 of the Convention.

The Court awarded the applicant EUR 25,000 in respect of non-pecuniary damage and EUR 100 for costs and expenses.

#### Commentary

The Government raised a preliminary objection as to the non-exhaustion of domestic remedies, which the Court rejected on the ground that it had to be raised in the Government's written or oral observations on the admissibility of the application.

In relation to Article 2, the Court found the existence of a causal link between the defective medical assistance and his death had been confirmed by the domestic medical experts and not disputed by the respondent Government.

The Court noted that the applicant's allegations of having seen her son attached with handcuffs to the bed at Apsheronk Hospital were disputed by the

Government. As the applicant's submissions were consistent and supported by appropriate evidence, whereas the Government's contentions lacked substantiation, the Court endorsed the applicant's version of events and found a violation of Article 3.

With regards to Article 34, the Court reiterated that it was of the utmost importance for the effective operation of the system of individual petition that applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints. In the present case, the applicant's witness, Ms T., had twice been asked to appear before a prosecutor and to answer questions relating to one of the applicant's complaints to the Court, concerning the use of handcuffs on Mr Tarariyev at Apsheronk Hospital.

The Court formed the view that the interviewers attempted to obtain information which could be used for investigation of the treatment applied to Mr Tarariyev and for identification of those responsible. Moreover, Ms T. was not forced to give evidence to the prosecutor. It appeared that the language used by the prosecutor did not contain any expressions, references or insinuations of a threatening or dissuasive nature.

In light of this, the Court concluded that the questioning of Ms T. did not amount to "pressure", "intimidation" or "harassment" which might have hindered the applicant in the exercise of her right of individual petition. Consequently, the respondent State had not failed to comply with its obligations under Article 34 of the Convention.

In his partly dissenting opinion, the Judge Borrego expressed his disagreement with the majority in this regard. He considered that Ms T., who witnessed the conditions in which Mr Tarariyev was treated at the hospital, was subjected to pressure by the Russian authorities to withdraw or modify her complaint. Following a request by the Government's Representative before the European Court after the admissibility decision, she was summoned to the Severskiy district prosecutor's office, where she was questioned on two consecutive days. She stated that she had been intimidated. Moreover, the right of individual petition did not entitle High Contracting Parties to lie freely about the facts. The Government had however challenged as untrue the applicant's allegation that Mr Tarariyev had been shackled to the hospital bed, which the Court had found to be the true version of events.

## ***Anter and Others v. Turkey***

(55983/00)

**European Court of Human Rights:** Judgment of 19 December 2006

*Failure to investigate the circumstances of an extra-judicial killing - Right to life - Right to a fair trial - Right to an effective remedy - Article 2 combined with Article 14, and Article 6(1) and (2) combined with Articles 2, 13 and 14*

### Facts

Two of the applicants, Raşan Anter Yorozlu and Dicle Anter, are Turkish nationals. The third applicant, Anter Anter, is a Swedish national. They were born in 1948, 1950 and 1945, and live in Vasteras (Sweden), Muğla (Turkey) and Uppsala (Sweden), respectively.

The applicants' father, Musa Anter was a well-known pro-Kurdish personality, and one of the founder members of the People's Labour Party (HEP). He was the director of the Kurdish Institute of Istanbul, and a writer and a columnist for several newspapers. On 20 September 1992, Mr Anter was shot dead in Diyarbakır, where he had been invited to a festival held by the municipality. His friend Orhan Miroğlu, who had accompanied him, was seriously injured in the incident.

The same day, an incident report was made and an autopsy of the body carried out. Two days later, a ballistic report was delivered from the police laboratory. It appeared that Musa Anter had died from wounds caused by five bullets. The autopsy report mentioned that Süphan Mete, who had identified the body, stated that Musa Anter had been threatened in the preceding weeks.

On 21 September 1992, the state prosecutor of Diyarbakır declared the matter to be outside his competence *ratione materiae*<sup>2</sup> and transferred the file to the state prosecutor of the Diyarbakır State Security Court.

From 22 September 1992, the police took several witness statements, notably one from Orhan Miroğlu, who declared that on the day of the incident, Musa Anter was expecting a visit to solve a property issue, at the hotel where he was staying. A man had finally come, and the three of them had then taken a taxi. As they were walking afterwards, the man fired at them. According to several statements, a man called Dijvar, who spoke Kurdish with a specific accent, had

2 Falls outside the scope of the relevant legislation

come to the hotel on the evening of the incident and had left together with Musa Anter and Orhan Miroğlu.

On 23 September 1992, an identikit portrait of the alleged murderer, produced thanks to the witness statements, was published in the press. On 28 September 1992, the police presented some photographs of Iraqi refugees. The witnesses saw similarities between the alleged murderer and one of the refugees who had left Turkey at the time. Two articles were further published, accusing a police officer of the murder. Subsequently, on 15 November 1992, the police staged an identity parade showing the accused agent to the witnesses, who stated that he was not the person that they had seen.

On 30 April 1993, the state prosecutor asked the Nusaybin prosecutor's office to identify the life tenants of the real estate of the late Musa Anter, which was located in his native village, and to collect their statements. He noted that a press article had mentioned that these properties had been seized by the PKK as Musa Anter had refused to pay the revolutionary tax and had fled to Istanbul. The statements were taken later that year, by the Akarsu gendarmes.

On 15 June 1995, Süphan Mete stated that Musa Anter, who had refused to pay the revolutionary tax, had been forced to leave his village by the PKK's death threats, as the organisation accused him of collaboration with the authorities. Dijvar was a PKK member who had got in touch with Musa Anter and had said, on the day of the incident, that he was going to pick him up at the hotel.

On 17 December 1998 and 14 January 2000, the applicant Dicle Anter asked the state prosecutor about the investigation. He was informed that it was ongoing.

The applicants sent the Court a copy of the Susurluk report, an infamous document reporting, *inter alia*, connections between the government, organised crime, and a string of murders. Relevant to this case, the report stated that the murder of Musa Anter was an extra-judicial killing perpetrated with the knowledge of the authorities. It designated a man named Mahmut Yıldırım, also called Ahmet Demir or "Yeşil", as its mastermind and author. This well-known criminal, despite his background, was a member of the JITEM, an unofficial intelligence and anti-terrorism service of the gendarmerie made up of village guards and former PKK members recruited to fight against the PKK. The applicants further submitted a book that related the confessions of alleged former PKK member Abdulkadir Aygan. His confessions included participation in the killing of Musa Anter and others as well as a description of how Anter's murder was organised

and the names of all implicated persons. The applicants also submitted several articles published in various newspapers about these revelations. The applicants submitted that the authorities did not proceed with any investigation in this regard.

### Complaints

The applicants argued that their father had been the victim of an extra-judicial killing for his pro-Kurdish activities and ideology, claiming a violation of Article 2 of the Convention.

The applicants further argued that the authorities failed to undertake an effective investigation which would have made it possible to find those responsible for his murder. They also complained of having been deprived of an effective remedy in order to present their claims. They relied on Articles 2 and 13 of the Convention.

The applicants finally claimed a violation of Article 14, in conjunction with Articles 2 and 13 of the Convention.

### Held

The Court held that the Government's failure to protect Musa Anter's life amounted to a violation of Article 2.

The Court further held that the Government's failure to lead an effective investigation into the circumstances of the killing was in further violation of Article 2.

The Court further held that there had been a violation of Article 13.

The Court considered that it was not necessary to examine the complaint under Article 14.

The Court awarded the applicants EUR 25,000 jointly for non-pecuniary damage and EUR 3,500 jointly for costs and expenses.

### Commentary

The Court recalled that the first sentence of Article 2(1) obliged the state to take all measures necessary to protect the life of persons under its jurisdiction. This included the duty of the state to implement a concrete criminal legislation preventing, combating and sanctioning violations, as well as the positive

obligation to take preventive measures to protect individuals whose lives were threatened in a real and immediate manner by the criminal acts of a third person, if the authorities know or are in a position to know about them.

In the present case, the applicants' allegations that their father had been the victim of an extra-judicial killing committed by state agents were not based on concrete and demonstrable facts. Consequently, it was not established beyond reasonable doubt that a state agent or a person acting on behalf of state authorities had been involved in the killing of Musa Anter. However, there were serious reasons to believe that the authors of the murder were known to the authorities. In this regard, the Court recalled the relevant findings of the Susurluk report which, as the Government reminded, had no legal value, but were nonetheless important. The report gave serious support to widespread allegations that some groups of counter-insurgents were targeting individuals presumed to be acting against the interests of the state, with the assent, or even the help of state officials.

The Court recalled that it was not disputed that at the time of the conflict in south-eastern Turkey, well-known Kurdish personalities suspected of supporting the PKK, were regularly assassinated "by an unidentified murderer". The Court was convinced that Musa Anter, as a political figure and well-known pro-Kurdish writer, was particularly at risk. Given the circumstances, this risk could have been held as real and imminent. In light of the above, the authorities should have known that the risk probably came from persons or groups acting with the knowledge or assent of state agents, which was confirmed by the Susurluk report regarding the murder of Musa Anter, and more generally by a 1993 report by a parliamentary commission.

The Court concluded that, in these particular circumstances and given the personality of Musa Anter, the authorities did not take the measures to which they might reasonably have resorted to prevent the occurrence of a real and imminent danger to the life of Musa Anter, in violation of Article 2.

### ***Akpınar and Altun v. Turkey***

(56760/00)

**European Court of Human Rights:** Judgment of 27 February 2007

*Unlawful death and mutilation of dead bodies - Right to life - Prohibition of inhuman or degrading treatment - Article 2 and Article 3*

### Facts

The applicants, Tamiş Akpınar and Fevzi Altun, are Turkish nationals who were born in 1957 and 1949 and live in Aydın, Turkey, and in Australia, respectively.

On 14 April 1999, Seyit Külekçi, the brother of the first applicant, was killed by the security forces together with the second applicant's son, Doğan Altun, in an armed clash in the Yeşilalan village of Turhal, in Tokat. The incident report alleged that the security forces had set up this ambush in order to capture members of the TKP-ML/TIKKO (the Communist Party of Turkey/Marxist-Leninist/Turkish Workers and Peasants' Liberation Army), and that two members of the organisation were then killed during an armed clash.

On 15 April 1999, post-mortem examinations of the bodies, identified as those of Seyit Külekçi and Doğan Altun, were carried out in the Turhan gendarmerie command, in the presence of the Turhal public prosecutor. The expert report stated that Doğan Altun had received nine bullet wounds and that half of his left ear had been severed. Seyit Külekçi had received eight bullet wounds and both of his ears had been severed.

The expert report noted numerous others wounds, but concluded that the deaths were a result of wounds caused by firearms and that there was no need to further carry out a classical autopsy.

On 16 April 1999 the corpses of Doğan Altun and Seyit Külekçi were returned to the second applicant, Fevzi Altun, and Seyit Külekçi's brother, Ali Külekçi. The Turhal public prosecutor initiated an investigation against the deceased and four others, suspected of belonging to the TKP-ML/TIKKO.

On 15 June 1999, the applicants lodged a petition with the Turhal public prosecutor's office. They alleged that their relatives had been tortured before they died, or that the security forces had ill-treated the corpses. They requested the public prosecutor to initiate an investigation into those members of the security forces responsible for the mutilation of their relatives' bodies.

An investigation was opened into the applicants' allegations, further joined by other investigations concerning the same incident. Several witness statements were taken, notably in February, March and April 2000.

On 3 September 2000 the Turhal public prosecutor decided to separate the investigation against the officers who had participated in the operation of 14 April

1999 from the investigation against the deceased and the four other suspects who had fled on the same day, as these matters fell within the jurisdiction of different courts. The public prosecutor characterised the charge against the security forces as that of “insulting corpses”.

On 10 October 2000 the Turhal public prosecutor filed a bill of indictment charging four gendarmerie officers with “insulting” the corpses of Seyit Külekçi and Doğan Altun. The same day, the Turhal Criminal Court of First Instance commenced the trial. On 31 October 2000, one of the officers maintained before the Kurşunlu Criminal Court of First Instance that he had neither seen nor ill-treated the dead bodies. On 5 January 2001, the court deferred the imposition of a final sentence upon the accused. It held that criminal proceedings would be suspended and a final sentence imposed should they be convicted of a further intentional offence within five years. The judgment of 5 January 2001 became final, as no appeal was filed against it.

### Complaints

The applicants complained under Article 2 that the use of force by the security forces had been disproportionate and therefore the killing of Seyit Külekçi and Doğan Altun was unlawful.

They further complained under the same Article that the investigation opened into their allegations had been ineffective.

The applicants argued that the mutilation of their relatives’ bodies, either before or after their death, was in violation of Article 3. They also complained under the same head about their own emotional suffering upon seeing the mutilation of the bodies.

Finally, the Applicants alleged that the investigation initiated into the circumstances surrounding the deaths of their relatives had been inadequate, in violation of the same Article.

### Held

The Court held that there had been no substantive violation of Article 2 concerning the killing of Seyit Külekçi and Doğan Altun.

The Court however held, as regards the second limb of the applicants’ complaint under Article 2, that Turkey’s failure to conduct an effective investigation into the circumstances surrounding their killing constituted a violation of this article.

The Court then held by six votes to one that there had been no violation of Article 3 with regards to Seyit Külekçi and Doğan Altun.

However, the Court concluded that the anguish suffered by the applicants, who were presented with the mutilated bodies of their relatives, amounted to degrading treatment, in breach of Article 3.

The Court further held that it was not necessary to examine separately the alleged procedural violation of Article 3, in view of its findings under Article 2.

The Court awarded the applicants EUR 20,000 each for non-pecuniary damage, and EUR 3,930 (less EUR 715 granted by way of legal aid) for costs and expenses.

#### Commentary

In relation to Article 2, the Government claimed that the applicants had only referred to the mutilation of their relatives' bodies, not to their killing, in their petition to the public prosecutor. However, the Court recalled that Article 35 § 1 had to be applied with some flexibility and that it was essential to have regard to the circumstances of the individual case. It further reiterated the State's obligation to carry out effective official investigation when individuals have been killed as a result of the use of force.

With this in mind, the Court observed that the applicants' relatives were killed during an armed clash with the security forces at a time when there were serious problems in the fight against terrorism in Turkey. The Court considered that the applicants, who could have felt apprehensive of representatives of the State, could legitimately have expected that the necessary investigation would have been conducted without a specific complaint on their part. They nevertheless submitted a petition to the public prosecutor's office. The Court considered that the applicants took steps in respect of their relatives' deaths as far as their knowledge of the surrounding circumstances allowed, in the absence of an independent and impartial official investigation instigated by the judicial authorities on their own motion into the circumstances of their relatives' deaths.

In cases involving questions concerning the use of force by security forces, the Court had to examine not only whether the force employed was legitimate, but also whether the operation was regulated and organised in such a way as to minimise, to the greatest extent possible, any risk to individual life. Given the unclear circumstances of the present case, the Court was unable to establish

“beyond reasonable doubt” that Seyit Külekçi and Doğan Altun were deprived of their lives by the security forces as a result of a use of force which was no more than absolutely necessary. The Court therefore had to conclude that there had been no violation of Article 2 under its substantive limb.

The Court considered it established that the mutilation of the bodies occurred while they were in the hands of State security forces, but nevertheless considered that there was no violation of Article 3 on the account of the act of mutilation itself. As it was unable to establish that the mutilation occurred before death since the domestic courts had not established the facts, and referring to previous related cases, the Court concluded that Seyit Külekçi and Doğan Altun’s ears were cut off after they had died. The Court had never applied Article 3 in the context of respect for a dead body. The present Chamber maintained that the human quality is extinguished on death and, therefore, the prohibition on ill-treatment is no longer applicable to corpses, despite the cruelty of the acts concerned.

However, In her partly dissenting opinion, judge Fura-Sandström related how she voted in favour of finding a violation of Article 3 in relation to the mutilation of the bodies of Seyit Külekçi and Doğan Altun . She reminded the Court that, in light of the preparatory work on Article 3, that the purpose of this provision was to protect bodily integrity and human dignity and considered that the duty to respect an individual’s human dignity could not be ended with the death of the individual in question. Human dignity extended also to the dead, as the living owe them continuing honour and respect. Having acknowledged that there was no common European standard in approaches to death, she however regretted that the Court had not taken the opportunity, in the present case, to extend protection under Article 3 beyond those living now, and to take a step further in the protection of human dignity.

### ***Baysayeva v. Russia***

(74237/01)

**European Court of Human Rights:** Judgment of 5 April 2007

*Disappearance case –Right to life - Articles 2, 3, 5, 6, 13, 34, 38*

#### Facts

The applicant, Asmart Magomedovna Baysayeva, is a Russian national who was born in 1958 and lives in the village of Pobedinskoye, Grozny district,

Chechnya.

The applicant's husband, Shakhid Baysayev, worked in the neighbouring village of Podgornoye. The road he had to take went through a Russian military checkpoint, no 53. On 2 March 2000, after he had left for work, a convoy of the OMON (special police forces) was attacked on the road. The fighting was followed by a "sweeping" operation (*zachistka*) in Podgornoye. The applicant's husband never came back.

In the following days, the applicant questioned numerous witnesses, trying to find out about her husband. It appeared that during the "sweeping" operation, he had been beaten and taken away by the Russian servicemen from the checkpoint. At the checkpoint, the soldiers told the applicant that they had been brought in as replacements and were not aware of any detainees. The Government further submitted that Shakhid Baysayev was not listed among the detainees, in any detachment of the Ministry of the Interior in the Northern Caucasus.

From 2 March 2000 onwards, the applicant applied repeatedly to numerous authorities and public figures, asking for assistance and details on the investigation. On 31 May 2000 the Chechnya Prosecutor's Office wrote to the head of the Department of the Interior in Chechnya, requesting that a search for missing persons be organised, regarding among other persons the applicant's husband. In June 2000, an investigator within the Grozny Town Prosecutor's Office told the applicant that her husband had been detained by servicemen on 2 March 2000 and taken to a base near Podgornoye. He also said that a videotape existed proving this information. The Grozny Town Prosecutor's Office further opened a criminal case for kidnapping. The applicant also started to search for her husband's body in burial places. She saw about 400 dead bodies, but did not find her husband.

At the beginning of August 2000, the applicant was shown extracts from a videotape dated 2 March 2000 by a masked man whom she paid money, in which she recognised her husband lying on the ground, being kicked and insulted by soldiers. She was given photographs and a map of burial places, including that of her husband. She was told that the tape was known to the prosecutor's office and given its registration number. The next day she went to the Grozny Prosecutor's Office where an investigator confirmed that he knew about the tape. One week later, the applicant bought the videotape for 1,000 USD.

On August and September 2000, the applicant, together with an investigator from the Grozny Town Prosecutor's Office, travelled twice to the presumed burial site indicated on the map, which was within a military compound near checkpoint no.53.

In the meantime, on 7 September 2000 investigative measures into the kidnapping of Mr Baysayev were carried out. However, on 14 September 2000 the criminal investigation was adjourned owing to a failure to identify those responsible. From 9 October 2000 onwards, the applicant's request was transferred several times between different prosecutor's offices. On 23 April 2001 the Grozny Town Prosecutor's Office provided the applicant with a progress report in criminal investigation. The note stated that the investigation had been opened on 10 May 2000, then adjourned and later resumed.

On 28 June 2001 the Grozny District Court declared Mr Baysayev a missing person. On 29 November 2001 the criminal case was adjourned again. On 7 December 2001 the applicant applied to the Grozny Town Prosecutor's Office, requesting the resumption of the investigation and the inspection of the alleged burial site.

On 8 December 2001 the applicant, together with two investigators, travelled to the location of checkpoint no. 53. The investigators started excavations and found a piece of cloth resembling the coat the applicant's husband was wearing on the videotape. They collected the items and agreed with the military that they would come back the next day with a video camera. However, they were killed when their car blew up as they were on their way to the Prosecutor's Office. At the Grozny Town Prosecutor's Office, it was suggested to the applicant that she had been involved in the killing of the investigators and was told either to stop searching for her husband's body, or risk her own safety and that of her children.

In 2003 the applicant tried to obtain information about developments in the case. The Grozny Town Prosecutor's Office wrote on 15 August 2003 that the investigation had been adjourned for failure to identify those responsible. Attached to the letter was a decision granting victim status to the applicant, dated 15 January 2002. In February 2004 and December 2005, the European Court requested the Government to submit a copy of the complete case file; however, they submitted an incomplete file, alleging military secrets.

Between 2004 and 2006 the applicant on more than a dozen occasions applied

to the various official bodies with requests for information about the fate of her husband and about the investigation. The investigation was adjourned and reopened several times. On 9 February 2006 the applicant submitted a complaint to the Staropromyslovskiy District Court alleging negligence on the part of the district prosecutor's office. On 13 February 2006 she requested the district court to declare her husband dead.

On 22 March 2004 a prosecutor from the Staropromyslovskiy District Prosecutor's Office visited the Applicant at her home and asked her to sign a statement that she had not been subjected to any threats after her application to the European Court. The applicant submitted that since the disappearance of her husband her health had worsened significantly, and she required regular treatment and injections. On 13 February 2004 she had a stroke. She has suffered from restlessness, anxiety and insomnia.

### Complaints

Relying on Article 2 of the Convention, the applicant alleged that her husband had been unlawfully killed by agents of the State. She also submitted that the authorities had failed to carry out an effective and adequate investigation into the circumstances of his disappearance.

The applicant claimed violations of Article 3 of the Convention, arguing that Shakhid Baysayev had been subjected to inhuman and degrading treatment and that the authorities had failed to investigate this allegation. She also complained that the suffering to which she had been subjected as a result of her husband's disappearance constituted ill-treatment.

Under Article 5, the applicant submitted that Shakhid Baysayev had been subjected to unacknowledged detention. The applicant further complained that she had been denied access to a court, in violation of Article 6 of the Convention.

Relying on Article 13 of the Convention, the applicant then complained that she had had no effective remedy in respect of the violations alleged under Articles 2, 3 and 5 of the Convention.

The applicant finally argued that the Government's failure to submit the entire criminal investigation file to the Court disclosed a failure to comply with its obligations under Articles 34 and 38(1)(a) of the Convention.

### Held

The Court held that there had been a violation of Article 2 in respect of the disappearance of Shakhid Baysayev. The Court further held there had been a violation of the same Article in respect of the failure to conduct an effective investigation into the circumstances of the disappearance.

The Court held that there had been no violation of Article 3 in respect of the failure to protect the applicant's husband from inhuman and degrading treatment. The Court also held that no separate issues arose under Article 3 in respect of the investigation into the allegations of ill-treatment.

The Court further held that there had been a violation of Article 3 in respect of the applicant's anguish and distress, given the attitude of the authorities.

The Court held that there had been a violation of Article 5 in relation to the holding Shakhid Baysayev in unacknowledged detention, in the complete absence of the safeguards contained in that Article.

The Court further held that no separate issues arose under Article 6, as this concerned, essentially, the same issues as those discussed under the procedural aspects of Article 2 and of Article 13.

The Court held that there had been a violation of Article 13 in respect of the alleged violations of Articles 2 and 3. The Court held that no separate issues arose under Article 13 in respect of the alleged violation of Article 5, which itself contained a number of procedural guarantees related to the lawfulness of detention.

The Court held that there had been a failure to comply with Article 38(1)(a).

The Court further held that there was no need to examine separately the applicant's complaints under Article 34.

The Court awarded the applicant EUR 1,732 for pecuniary damage, EUR 50,000 for non-pecuniary damage, and EUR 12,994 for costs and expenses.

### Commentary

The Court considered it established that Mr Baysayev's apprehension coincided with the special security operation carried out on 2 March 2000. Given that the authorities had not disputed the fact that the video depicted servicemen, the

Court concluded that Mr Baysayev was last seen being apprehended by State servicemen.

The Court noted with great concern that a number of cases had come before it regarding the phenomenon of “disappearances” in Chechnya. In this context, being detained by unidentified servicemen without any subsequent acknowledgement of detention could be regarded as life-threatening. Mr Baysayev had been absent for over six years. Moreover, the stance of the law-enforcement authorities after the news of his detention significantly contributed to the likelihood of his disappearance, as the necessary steps were not taken in the crucial first days or weeks. Their behaviour raised strong doubts as to the objectivity of the investigation.

The Court concluded that it had been established beyond reasonable doubt that Shakhid Baysayev had to be presumed dead following unacknowledged detention by State servicemen. Consequently, the responsibility of the respondent State was engaged. Noting that the authorities did not rely on any justification in respect of the use of lethal force by their agents, it followed that liability for his presumed death was attributable to the respondent Government. Accordingly, there had been a violation of Article 2.

In relation to Article 5, this requires the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an arguable claim that a person has been taken into custody and has not been seen since. It was established that the applicant’s husband was detained on 2 March 2000 by the federal authorities and had not been seen since. His detention was not logged in any custody records and there existed no official trace of his subsequent whereabouts. In accordance with the Court’s practice, this fact in itself had to be considered a most serious failing, since it enabled those responsible for an act of deprivation of liberty to escape accountability for the fate of a detainee. The Court further considered that the authorities should have been alert to the need to investigate more thoroughly and promptly the applicant’s complaints. Moreover, the Court’s reasoning and findings in relation to Article 2 left no doubt that the authorities had failed to take effective measures in this regard. Accordingly, the Court found that Mr Baysayev had been held in unacknowledged detention in the complete absence of the safeguards contained in Article 5.

## Prohibition of torture or inhuman & degrading treatment

### *Salah Sheekh v. the Netherlands*

(1948/04)

**European Court of Human Rights:** Judgment of 11 January 2007

*Deportation of an asylum seeker, Risk of torture,, Expulsion, Article 3, Article 13*

#### Facts

The applicant, Abdirizaq Salah Sheekh, is a Somali national born in 1986 and currently living in Amsterdam.

On 12 May 2003, the applicant left Somalia and arrived at Amsterdam Schiphol Airport on a false passport and asked for asylum. He originally hailed from Mogadishu and belonged to the minority Ashraf population group. In 1991, due to the civil war, his family was forced to leave behind their belongings in Mogadishu and flee to the village of Tuulo Nuh, 25 km from Mogadishu, where they lived in primitive conditions.

After their flight from Mogadishu, the family was robbed of their remaining possessions. Tuulo Nuh was controlled by the Abgal clan of the Hawiye clan-family. That clan's armed militia knew that the applicant and his family had no means of protection because they belonged to a minority, and for that reason the family was persecuted. Three other Ashraf families were living in Tuulo Nuh; they were treated in the same manner.

The applicant claimed that his father was killed by members of the Abgal militia and that they shot and killed his brother and then plundered his grocery store. He also stated that he and his brothers were beaten up several times on their home and that on two separate occasions they took the applicant's sister away and raped her.

His asylum request was refused on 25 June 2003. The Minister for Immigration and Integration considered that, among other things, he had made unreliable statements as to his date of birth which affected the credibility of his account. The Minister also found that the reasons advanced by the applicant for his flight were insufficient to qualify him as a refugee. The situation in Somalia for asylum seekers, whether or not they belonged to the Ashraf population group, was not

such that the mere fact that a person came from that country was sufficient for refugee recognition. The applicant's account contained insufficient indications that he had made himself known as an opponent to the (local) rulers. He had never been a member or sympathiser of a political party or movement. He had never been arrested or detained.

Furthermore, the Minister held that the problems experienced by the applicant had not come about as the result of systematic, major acts of discrimination but were rather a consequence of the general unstable situation in which criminal gangs frequently, but arbitrarily, intimidated and threatened people.

The Minister concluded that it had not appeared that there existed a real risk of the applicant being subjected to treatment in breach of Article 3 upon his return to Somalia. According to the Minister, returning the applicant to Somalia, given the general situation there, did not amount to undue harshness because, in order to avoid any future problems, he could settle in one of Somalia's relatively safe areas. There was no reason to conclude that a general humanitarian emergency situation pertained in those areas. Whether or not the applicant had family or clan ties in the relatively safe areas, or whether or not he had ever been there before, played no role in that context.

The applicant appealed against the rejection of his request for asylum on 26 June 2003. He also filed an objection against the refusal to grant him a particular residence permit for stateless persons. The Regional Court of The Hague rejected the applicant's appeal against the rejection of his request for asylum. The Regional Court attached relevance to the fact that the applicant could distance himself from the situation pertaining in his immediate living environment by moving to the "relatively safe areas" of Somalia.

Having been informed that he was to be issued with a European Union travel document and deported to the "relatively safe areas" of Somalia on 16 January 2004, the applicant lodged an objection on the basis of section 72(3) of the Aliens Act 2000 with the Minister on 8 January. He further requested the Regional Court to issue a provisional measure to the effect that he would not be deported pending the appeal. The applicant argued that there were too many incongruities surrounding a deportation as planned: not only was the legal basis of the EU travel document unclear, it was also not known whether the authorities in the "relatively safe" areas of Puntland and the Somali province of Mudug allowed persons travelling on such documents entry to their territory. In addition, the applicant, as a member of a minority unable to obtain protection from one of the

ruling clans, would be forced to live in a camp for internally displaced persons in the “relatively safe areas”, where the conditions were so appalling that they had been described as a clear violation of human rights by the UN Independent Expert on the situation of human rights in Somalia.

The Regional Court of The Hague rejected the applicant’s request for a provisional measure on 20 January 2004. It was held that the deportation with EU travel documents might only be unlawful if there were indications that entry to a territory would be denied to persons travelling with those documents. No such indications existed. Moreover, the airline company transporting rejected asylum seekers from Nairobi to Somalia had undertaken to return these persons should they be denied entry to Somalia.

On 15 January 2004, the applicant introduced an application to the European Court of Human Rights. That same day, the President of the Chamber, at the applicant’s request, indicated to the Government that it was desirable in the interests of the parties and the proper conduct of the proceedings before the Court, not to expel the applicant while the case was pending before the Court. Thereupon, the Netherlands authorities cancelled the applicant’s expulsion. The applicant was also released from aliens’ detention.

The applicant was granted a residence permit on the basis of a temporary “categorical protection policy” on 10 March 2006.

### Complaints

The applicant complained that his expulsion would expose him to a real risk of being subjected to torture or inhuman or degrading treatment, having regard to his personal situation of belonging to a minority in the light of the general human rights situation in Somalia. He relied on Article 3 of the Convention.

The applicant also complained that he did not have an effective remedy in that the Netherlands authorities refused to suspend his expulsion pending a decision on his objection against the manner of his expulsion, and therefore claimed a violation of Article 13.

### Held

The Court held unanimously that the applicant’s expulsion to Somalia would be in violation of Article 3.

The Court found that there had been no violation of Article 13 of the

Convention.

The Court held that there was no need to examine the issue of just satisfaction, no claim having been made by the applicant.

#### Commentary

The Court observed that it was not the Government's intention to expel the applicant to any area in Somalia other than those that they considered "relatively safe". The Court noted that although those territories – situated in the north – were generally more stable and peaceful than south and central Somalia, there was a marked difference between the position of, on the one hand, individuals who originate from those areas and have clan and/or family links there and, on the other hand, individuals who hail from elsewhere in Somalia and do not have such links.

As far as the second group was concerned, the Court considered that it was most unlikely that the applicant, who was a member of the Ashraf minority hailing from the south of Somalia, would be able to obtain protection from a clan in the "relatively safe" areas. It noted that the three most vulnerable groups in Somalia were said to be internally displaced persons, minorities and returnees from exile. If expelled to the "relatively safe" areas, the applicant would fall into all three categories.

The Court observed that Somaliland and Puntland authorities have informed the respondent Government of their opposition to the forced deportations of, in the case of Somaliland, non-Somalilanders and, in the case of Puntland, "refugees regardless of which part of Somalia they originally came from without seeking either the acceptance or prior approval" of the Puntland administration. In addition, both the Somaliland and Puntland authorities have also indicated that they do not accept the EU travel document. The Netherlands Government insisted that expulsions are nevertheless possible to those areas and pointed out that, in the event of an expellee being denied entry, he or she would be allowed to return to the Netherlands. They maintained that Somalis are free to enter and leave the country as the State borders are hardly subject to controls. The Court accepted that the Government might well succeed in removing the applicant to either Somaliland or Puntland. However, this by no means constituted a guarantee that the applicant, once there, would be allowed or enabled to stay in the territory, and with no monitoring of deported rejected asylum seekers taking place, the Government would have no way of verifying whether or not the applicant would have succeeded in gaining admittance. In view of the position

taken by the Puntland and particularly the Somaliland authorities, it seemed to the Court rather unlikely that the applicant would be allowed to settle there. Consequently, the Court found that there was a real chance of his being removed, or of his having no alternative but to go to areas of the country which both the Government and UNHCR consider unsafe.

The Court considered that the treatment to which the applicant claimed he had been subjected prior to his leaving Somalia could be classified as inhuman within the meaning of Article 3 and that vulnerability to those kinds of human rights abuses of members of minorities like the Ashraf has been well-documented.

The Court therefore concluded that the expulsion of the applicant to Somalia would be in violation of Article 3.

### ***Rashid v. Bulgaria***

(47905/99)

**European Court of Human Rights:** Judgment of 18 January 2007

*Use of force during an arrest - Prohibition of inhuman or degrading treatment - Right to an effective remedy - Right to liberty and security - Articles 3, 5 and 13*

#### Facts

The applicant, Erdjan Hussein Rashid, is a Bulgarian national who was born in 1968 and lives in Kardjali, Bulgaria. He is the owner of several gaming establishments and bars in the same town.

In the morning of 14 April 1997, masked policemen stormed into his house after having broken the front door, and used force to arrest him. His home, his office and one of his establishments were searched by some policemen from the National Direction of Struggle Against Organised Crime.. The same day, the applicant was admitted to hospital.

On 17 April 1997, a medical report ordered by the prosecutor referred to several swellings, bruises and abrasions on his face and body. He also had a wound above his right ankle, and had suffered concussion without loss of consciousness.

On 14 March 1999, the applicant's lawyer lodged a complaint before the public prosecutor, alleging that his client had been beaten up by the police officers

during his arrest and the search at his office.

A preliminary investigation was opened by the military prosecutor's office of Plovdiv. On 4 August 1999, the Ministry of Interior informed the military expert in charge of the enquiry that the names of the agents from the National Direction of Struggle Against Organised Crime who had participated in the arrest had to stay anonymous in accordance with Article 159(3) of the Interior Ministry Act.

On 6 October 1999, the regional military prosecutor ordered the opening of an investigation into the applicant's allegations of ill-treatment. On 1 November 1999, the applicant mentioned that the chief of the masked policemen who had beaten him had testified in the context of criminal proceedings against him.

Further interviews were held with some police officers and with the prosecutor who had ordered the search of the applicant's office. It appeared that they had been told that the applicant had resisted the arrest with a weapon, and that the policemen had thus had to use force against him. This was however not confirmed by any evidence.

On 16 December 1999, a medical examination was ordered. The experts stated that the applicant's allegations regarding the cause of the injuries were plausible. On 19 January 2000, the investigator requested the Anti-Terrorist Branch to provide him with the names of the individuals who had participated in the applicant's arrest. He was informed a week later that, in accordance with Article 159(3) of the Interior Ministry Act, the Branch had not kept any information about their identities.

On 14 February 2000, the Special Investigation Service informed the military investigator that the operation had been filmed. He watched the film and concluded that the applicant had not been ill-treated. By an order of 6 March 2000, he proposed to end the criminal proceedings, on the ground that the applicant had not been ill-treated. He concluded that the applicant's injuries were caused during his arrest.

On 7 April 2000 the regional military prosecutor ordered the discontinuation of the criminal proceedings, considering that from the evidence gathered it could not be concluded that the police officers had acted in breach of the law. The military prosecutor's office upheld that order and sent the case to the military court of appeal.

On 26 April 2000, the military court of appeal noticed that the version of the facts of the prosecuting authorities was not corroborated by the evidence gathered, as no witness had seen the applicant carrying a weapon and as the letter of the anti-terrorist branch was not valid evidence. However, the court upheld the order, on the ground that it was impossible to identify those responsible or to charge them, as the branch had not kept any information about their identities.

In the meantime, on 18 June 1999, the applicant went to the municipality of Kardjali in order to see the regional governor. He was told the governor was absent, but the applicant, seeing him, swore and accused him of discrimination towards ethnic minorities. He was held and handed over to the police. The following day, he was charged with aggravated breach of the peace constituting a repeat offence and was remanded in custody. The applicant's lawyer appealed that decision.

On 5 July 1999, the Kardjali District Court ordered the applicant's release on bail, as the detention was no longer justifiable. The bail was paid that afternoon at 5 pm, but when the lawyers arrived at the applicant's place of detention, the building was already closed to the public and the person they contacted by phone explained that his superior, in charge of these affairs, was absent. The following day, the applicant was transferred to the Plovdiv investigation service. He was only released on 6 July at 4 pm, 23 hours after his lawyers were given the receipt certifying that bail had been paid.

### Complaints

The applicant argued that the treatment inflicted on him by the police officers during his arrest had been in violation of Article 3.

Moreover, the applicant complained that the prosecutor who had ordered his remand in custody on 19 June 1999 was not a magistrate in the sense of Article 5 (3) and further complained that his remand in custody after the bail was paid had been in breach of the domestic law and thus contrary to the requirement of "respect of the legal proceedings" of 5(1).

He further complained that the failure to conduct an effective investigation into his allegations of ill-treatment amounted to a breach of Article 3 under its procedural head and of Article 13.

### Held

The Court held that the treatment inflicted on the applicant by police officers

during his arrest amounted to a violation of Article 3.

The Court examined the complaint under Article 13 solely, and held that this Article had been violated, on account of the failure to conduct an effective and adequate investigation into the applicant's allegations of ill-treatment.

The Court stated that the prosecutor who had remanded the applicant in custody could not be regarded as sufficiently independent and impartial to meet the requirements of Article 5(3), since he was prosecuting authority and potentially involved as a party to the judicial proceedings.

The Court concluded that the delay in the enforcement of the court's decision amounted to a violation of Article 5(1).

The Court awarded the applicant EUR 4,000 for non pecuniary damage and EUR 2,000 for costs and expenses.

#### Commentary

In relation to Article 3, the Court recalled that the use of force during an arrest had to be strictly necessary and proportionate and that the Government had to carry the burden of the proof. In the instant case, the Government alleged that the applicant had threatened the security forces with a weapon. The Court noted that the various injuries sustained by the applicant appeared too numerous and extensive to be the result of a use of force that had been made strictly necessary by the applicant's conduct. Furthermore, there was no evidence to show that the recourse to physical force had been provoked by the applicant's own conduct. The Court thus found that the Government did not provide convincing or credible arguments justifying the use of force, and that there had been a violation of Article 3.

The Court further considered that the investigation had not been effective, in violation of Article 13, identifying a number of shortcomings. The military investigator and the prosecutor's office had been unable to interview the police officers who had arrested the applicant because of the repeated refusals by the Ministry of the Interior to reveal their identities. The Court did not find it necessary to examine the conformity of the domestic law to the Convention, but highlighted that its application, in the present case, had caused the immunity of those responsible, which was in violation of the Convention.

Further, the military tribunal had ordered the discontinuation of the proceedings

on the grounds that, in the present circumstances, the investigation could not lead to the identification and punishment of the guilty parties. The authorities, after having been informed that the branch did not keep information about the identities of the involved persons, did not make any further step to identify them, even though the applicant had informed them that the chief of the group had testified in the context of criminal proceedings against the interested party. The Government did not justify why this person had not been interviewed. Finally, the prosecuting authorities did not seek to establish whether the allegation that the applicant had carried a weapon which was thereafter seized could be confirmed by any evidence. For these reasons, the Court found a violation of Article 13.

### ***Veli Tosun v. Turkey***

(62312/00)

**European Court of Human Rights:** Judgment of 16 January 2007

*Ill-treatment and illegitimate deprivation of liberty - Prohibition of inhuman or degrading treatment - Right to be brought promptly before a judge - Right to an effective remedy - Articles 3, 5(3) and 13*

#### Facts

The applicant, Veli Tosun, is a Turkish national who was born in 1973 and is currently detained in the prison of Diyarbakır.

On 22 July 1999, the applicant, who was suspected of being a member of the illegal PKK organisation, was arrested by the anti-terror section of Istanbul, as he was in possession of a false identity card. While he was in police custody in the building of the Istanbul Security Directorate, he was questioned and confessed to being a member of the PKK.

On 23 July 1999, the applicant was transferred to Diyarbakır. He thereafter underwent a medical examination. The provisional report stated that he had a 15 x 5 bruise on the left humerus. Later on that day, the applicant was further examined by a civil doctor, who diagnosed a bruise on his entire left biceps.

On 30 July 1999, a doctor from the Diyarbakır medical centre examined the applicant and did not find any trace of blows or violence on his body. The same day, the applicant was brought before the Diyarbakır State Security Court. Among others, he claimed to have been subjected to ill-treatment while he was

in police custody. The judge ordered his remand in pre-trial detention. Later on that day, a doctor examined the applicant and found a bruise measuring 15 x 6 cm on his left arm.

During this period, lawyers from the Diyarbakır bar visited the applicant. He constantly declared that he suffered from pains due to the ill-treatment he suffered in Istanbul and in Diyarbakır.

On 3 August 1999, the two representatives of the applicant lodged an appeal before the prosecutor of Diyarbakır, complaining that their client had been subjected to ill-treatment while in police custody, and when he entered Diyarbakır prison. The next day, the applicant was examined by a doctor who reported the existence of three bruises on the biceps.

On 26 August 1999, the prosecutor interrogated two cellmates of the applicant, who stated that the applicant had been severely beaten by gendarmes as he entered the prison. On 1 September 1999, the prosecutor stated its incompetence regarding the allegations of ill-treatment and transferred the file to the administrative committee of Diyarbakır, asking for a preliminary enquiry. On 18 November 1999, the Diyarbakır police concluded there was an absence of prosecution evidence, as the injuries were found before the applicant's transfer to Diyarbakır.

On 28 June 2000, the applicant was notified that the police had closed the file on 4 January 2000. On 24 September 2000, the applicant lodged an appeal before the administrative court of Diyarbakır against that decision, which was refused on 14 December 2000. On 22 March 2001, the prosecutor took a decision of incompetence and sent the file to the Diyarbakır administrative committee. On 15 May 2001, the administrative Court transferred the file to the prefecture of Diyarbakır, asking for a decision on the opening of criminal proceedings. The administrative committee's further decision to shelve the complaint was cancelled by the State Council on 20 June 2003.

On 16 January 2004, the high court of Diyarbakır wrote to the Diyarbakır Assize Court, with a decision of incompetence. On 13 December 2004, two of the seven gendarmes accused were acquitted by the Court, for lack of evidence; a decision is still pending for the other five. Three days later, the applicant lodged an appeal before the Court of cassation. The proceedings launched by the applicant are still pending before the domestic Courts.

At the same time, criminal proceedings were launched against the applicant. On 2 August 1999, the prosecutor brought criminal proceedings against him, relying on Article 125 of the Criminal Code punishing the membership of an illegal and armed organisation aimed at destroying the country's territorial integrity. The State Security Court repeatedly ordered the remand in custody of the applicant, at every hearing. Criminal proceedings against the applicant are still pending before the domestic Courts.

### Complaints

The applicant complained about the beatings and ill-treatment he had been subjected to while in police custody and as he arrived to the Diyarbakır prison. He relied on Article 3 (prohibition of inhuman or degrading treatment).

He argued, relying on Article 5(3) (the right to be brought promptly before a judge) that he had not been entitled to trial within a reasonable time or to release pending trial.

He further alleged that the authorities infringed Article 13 (right to an effective remedy) in not having conducted an effective investigation into his allegations of ill-treatment.

### Held

The Court held that Article 3 had been violated, as it concluded that the applicant had been subjected to inhuman and degrading treatment.

The Court also held that as the Applicant had not been released pending trial for such a long time, the Government had infringed Article 5(3).

The Court found that Article 13 had been infringed, as the authorities had failed to conduct the investigation with the necessary promptness and diligence.

The Court awarded the applicant EUR 15,000 for non-pecuniary damage, and EUR 2,000 for costs and expenses.

### Commentary

The Court decided to link the question of exhaustion of domestic remedies and admissibility to its consideration of the merits, as the proceedings against the gendarmes were still pending before the domestic courts, and as they were linked to the substance of the Applicant's claims. The Court noticed that an inquiry had been opened and proceedings started, but regretted the length of the

inquiry and the fact that the proceedings were still pending. The Court held that the Turkish authorities had not acted with sufficient promptness and reasonable diligence, which resulted in the quasi-impunity of the presumed culprits and the inefficiency of the criminal proceedings. The Applicant had thus exhausted all the relevant domestic remedies.

The Government had argued that the alleged facts had not been found to be true, and could not subsequently be held as a violation of Article 3. The Court recalled its case law, according to which it is free to make a judgment on the facts, in light of all the elements in its possession. The Court further noted that injuries which occurred whilst in police custody created strong presumptions. The Government had to give a plausible explanation regarding the origins of these injuries and to produce strong evidence contradicting the allegations of the victim, notably if these were confirmed by a medical certificate. The Court further noted that, in the present case, the subsequent medical certificates had not been contested and that the Government had not given any explanation on the cause of the injuries. The Court therefore concluded that the Government had to be held responsible for the injuries found on the Applicant's body.

Concerning the violation of Article 5(3), the Court noticed that the persistence of reasons for suspecting an arrested person to have committed an infraction was a *sine qua non* condition of the regularity of the detention, but that it was not sufficient anymore after a certain time. The Court thus had to establish whether the motives continued to legitimate the deprivation of liberty; they had to be "relevant" and "sufficient", and the domestic authorities had to have had a "particular diligence" while pursuing the proceedings. In the present case, the domestic Courts kept invoking quite identical, if not stereotypical formulas, such as "the nature of the alleged crimes" or 'the state of the proof". The Court alleged that these were strong indices of guilt, but could not justify by themselves the remand in custody of the applicant for such a long period. It therefore found a violation of Article 5(3).

**Zeynep Özcan v. Turkey**  
(45906/99)

**European Court of Human Rights:** Judgment of 20 February 2007

*Torture whilst in police custody - Prohibition of torture/inhuman & degrading treatment - Right to an effective remedy - Articles 3 and 13*

### Facts

The applicant, Zeynep Özcan, is a Turkish national who was born in 1973 and lives in Istanbul.

The applicant, who was suspected of having stolen money and jewelry from the home of an individual for whom she carried out housework, was arrested and placed in police custody on 2 July 1998. An initial medical report, drawn up on the same date, noted injuries. At the request of the prosecution service, the applicant was re-examined on 3 July; according to that report, she had injuries at her arms and on her cheekbone. It also stated that the applicant claimed that she had been suspended by the arms and slapped in the face, that her arms had been squeezed and that her hair had also been pulled.

The applicant was released on 3 July 1998. A ruling that there was no case to answer was issued on 9 July 1998. On the day of her release, the applicant lodged a complaint against the police officers responsible for her detention in police custody, alleging torture.

On 14 June 2002 Bakırköy Assize Court sentenced two police officers to ten months' imprisonment and 15 days of exclusion from public service for acts of torture and inhuman or degrading punishment or treatment in respect of the applicant, with a view to extracting a confession from her. The court then ordered a stay of execution of this sentence. It also ordered the police officers to pay the applicant about EUR 1,406 in respect of non-pecuniary damage.

### Complaints

The applicant alleged that she had been subjected to treatment contrary to Article 3 during her detention in police custody and complained of the lack of an effective remedy against this arbitrary action by the police.

### Held

The Court held unanimously that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention in relation to the lack of an effective investigation.

The Court awarded the applicant EUR 10,000 for non-pecuniary damage and EUR 3,500 for costs and expenses, less the EUR 750 already received as legal aid.

### Commentary

The Court recalled that, according to established case law, where a person claims to have suffered treatment contrary to Article 3 at the hands of the police or other state authorities, an effective inquiry must take place. This must not only identify but also punish those responsible.

In this respect, the Court noted that, in spite of the seriousness of the offences with which they were charged, the police officers had continued to exercise their duties within the police force. No disciplinary measure had been taken against them, even after the proceedings had terminated. In addition, both the manner in which the proceedings were conducted before the Assize Court and the sentences imposed on the police officers, which amounted to *de facto* impunity, were elements which called into question the State's vigilance. It therefore found a violation of Article 3.

### ***Hacı Özen v. Turkey***

(46286/99)

**European Court of Human Rights:** Judgment of 12 April 2007

*Abduction by gendarmerie officers and statements obtained under ill-treatment – Prohibition of torture and ill-treatment – Right to a fair trial - Articles 3, 5, 6 and 13*

### Facts

The applicant, Hacı Özen, is a Turkish national who was born in 1943 and lives in Şırnak, Turkey.

The applicant alleged that in June 1998, he was asked by two persons to help them, and threatened with death. As he was scared, he followed their instructions and went to a place where he was awaited by persons carrying weapons, who beat and abducted him, and took him to the Şırnak provincial gendarmerie command. During his detention in custody he was subjected to ill-treatment. He was stripped naked and beaten, deprived of food and water, prevented from going to the toilet, threatened with death and insulted. The gendarmerie officers also attempted to rape him.

In the evening of 11 June 1998, the applicant's son applied to the Şırnak Security Directorate, claiming that his father had been seen being abducted by one of

their neighbours. On 12 June 1998 an official report was drawn up concerning his claim. On 13 June 1998, a similar protocol was drawn up containing the neighbour's statement. On 15 June 1998, the applicant was brought before a forensic doctor, who drafted a medical report. He referred to several bruises and scratches on the applicant's body, and to a trauma on his parietal bone. This was confirmed by a further medical examination.

On 23 June 1998 the gendarmerie officers drafted a document where the applicant admitted to have willingly acted as a courier for the PKK and have fallen and sustained injuries while trying to escape on 15 June 1998, the day of his arrest. The applicant was forced to apply his thumbprint to this document.

According to the Government, on 15 June 1998 the applicant was arrested by officers from the Şırnak provincial gendarmerie command on suspicion of aiding the PKK. According to the arrest report and the incident report, on 15 June 1998, the applicant was captured in a rural area while carrying bags that he was taking to members of the PKK. He tried to escape and fell, hitting his head and sustaining injuries to his body. It is to be noted that both reports do not bear the signature of the applicant.

Following his arrest, the applicant was examined by a doctor and taken to the Şırnak gendarmerie command where he made statements admitting that he had aided the members of the PKK. The applicant was kept in custody until 24 June 1998, when he was brought before the Şırnak public prosecutor. He denied the accusations against him and maintained that he had been forced to sign the statements. He further pleaded not guilty before the Şırnak Magistrates' Court, which ordered his detention on remand. The court took note of the applicant's allegation that he was threatened with death and decided to refer his complaint to the public prosecutor's office.

On 30 June 1998 the Şırnak public prosecutor issued a decision of non-jurisdiction regarding the investigation against the applicant and transferred the case to the Diyarbakır State Security Court. On 9 July 1998 the public prosecutor at the Diyarbakır State Security Court charged the applicant with aiding an illegal organisation.

The Diyarbakır State Security Court was composed of three judges including a military judge, who was replaced by a civilian judge in June 1999, after Turkey's Grand National Assembly amended the Constitution and excluded militaries from State Security Courts. The military judge however assisted to the majority

of the hearings.

On 17 August 1998 the Şırnak public prosecutor decided to discontinue the investigation based on the allegation of the applicant's son. On 21 December 1998 the applicant's representative complained *inter alia* before the Diyarbakır State Security Court that the applicant had been ill-treated. The court decided that he be authorised to lodge a complaint with the public prosecutor's office.

Some statements of gendarmerie officers were further taken. The applicant also made statements with the assistance of an interpreter. The applicant's lawyer continuously maintained that the applicant's arrest and the length of his detention in custody had been unlawful and that he had been subjected to ill-treatment while in custody.

On 13 December 1999, the Diyarbakır State Security Court convicted the applicant of aiding and abetting the members of the PKK and sentenced him to three years and nine months' imprisonment. The court relied on the applicant's statements made while in custody, and the statements of the gendarmerie officers. On 20 March 2000 the applicant appealed against the judgment of 13 December 1999. On 18 October 2000 the Court of Cassation dismissed the applicant's appeal and upheld the judgment of the Diyarbakır State Security Court.

### Complaints

The applicant complained under Articles 3 of the Convention that he had been subjected to ill-treatment while in detention in the Şırnak provincial gendarmerie command.

The applicant complained under Article 5(3) of the Convention that he had been kept in police custody for thirteen days without being brought before a judge or other officer authorised by law to exercise judicial power.

The applicant complained under Article 6(1) of the Convention that he had been denied a fair hearing on account of the presence of a military judge on the bench of the Diyarbakır State Security Court. He further alleged under Article 6(1) and (3)(c) of the Convention that he had been deprived of his right to legal assistance while in custody and that the judgment was based on statements obtained as a result of ill-treatment.

The applicant alleged that he was denied an effective domestic remedy in respect of his complaint of ill-treatment, in violation of Article 13 of the Convention.

Held

The Court held by six votes to one that there had been a violation of Article 3 of the Convention.

The Court held that there had been a violation of Article 5(3) of the Convention, as the applicant's detention in police custody was in conformity with the domestic legislation in force at the time, but fell outside the strict time constraints of the Convention.

The Court held that there had been a violation of Article 6(1) of the Convention in that the applicant was not tried by an independent and impartial tribunal.

The Court held by six votes to one that there has been a violation of Article 6(1) and (3)(c) of the Convention in that the applicant did not have a fair trial.

The Court further held that there has been a violation of Article 13 of the Convention.

The Court awarded the applicant EUR 15,000 for non-pecuniary damage, and EUR 1,800 for costs and expenses, less EUR 685 granted by way of legal aid.

Commentary

The Court noted that the Şırnak public prosecutor held that the applicant had been arrested by the gendarmerie on 15 June 1998. However, he did not attempt to conduct further enquiries concerning the applicant's whereabouts between 11 and 15 June 1998, and moreover based his decision on the arrest report drawn up by the gendarmerie officers without having questioned it although there were other elements in the investigation file which cast doubt on its credibility. The Court further recalled its earlier findings concerning the inadequacy and unreliability of the custody records of the gendarmerie in south-east Turkey in the nineties.

The Court concluded that it found it established that the applicant was arrested on 11 June 1998 by officers from the Şırnak gendarmerie command and kept in custody until 15 June 1998 without his detention being officially recorded. The Court thus accepted that the applicant sustained the injuries while in the State authorities' control. The Court observed that the applicant was not examined medically at the beginning of his detention and did not have access to a lawyer or doctor of his choice while in custody. The medical reports referred to injuries on various parts of the applicant's body which were consistent with the applicant's

allegations of ill-treatment. In this connection, the Court observed that the Government had not provided a plausible explanation for the marks and injuries identified on the applicant's body. In light of the above, the Court concluded that the injuries noted in the medical reports were the result of inhuman treatment for which the Government bore responsibility, in violation of Article 3.

In his partly dissenting opinion, Judge Türmen<sup>3</sup> expressed his disagreement with the finding that there had been a violation of Article 3 of the Convention. He considered that the actual circumstances remained a matter for speculation and assumption and that there was insufficient evidence on which to conclude beyond reasonable doubt that such a violation had taken place.

### ***Erdoğan Yağız v. Turkey***

(27473/02)

**European Court of Human Rights:** Judgment of 6 March 2007

*Handcuffing of a suspect in public followed by depression - Prohibition of inhuman or degrading treatment – Articles 3, 5 and 8*

#### Facts

The applicant, Erdoğan Yağız, is a Turkish national who was born in 1954 and lives in Istanbul, Turkey.

On 26 November 1999, a woman lodged a complaint against two people for threatening her, alleging that they were protected by “Erdoğan, security police chief”. On 5 February 2000, the applicant, who worked as a doctor for the Istanbul security police, was arrested in the car park of the Security Police building by three police officers who handcuffed him in public. The applicant informed the policemen that he was an official doctor within the Security Directorate and that his arrest was a mistake; he begged them not to handcuff him in front of hundreds of people. He was however handcuffed and remanded in police custody, in the organised crime and arms traffic section.

The same day, without having informed him of the charges against him, the police searched his place of work and his house. The applicant was taken there in handcuffs. According to him, he asked again for the handcuffs to be removed,

3 The Turkish judge before the ECtHR

and even proposed to go there after sunset to avoid being publicly exposed. The policemen refused and moreover obliged him to walk in the street before arriving at his home. They insulted him in front of his family during the search. The applicant was brought back to the Security Direction buildings. He was obliged to stay on a chair, handcuffed and eyes covered, in front of his colleagues.

On 7 February 2000, his statement was taken by the police, whilst he still had not been informed of the charges against him. He was asked to answer questions about his relationship with some persons also in custody, S.Ç. and G.A (sic). He explained that in November 1999, these people had lent him some money. One day, they asked him to come to their shop urgently. When he arrived, he realised they were going to be arrested. He had tried to intervene, explaining who he was and showing his badge to the policemen. He had paid back the money he owed to them 15 or 20 days later and had not seen them since. The applicant was released on 8 February 2000 by the Bakırköy prosecutor's office.

On 10 February, the applicant was examined by a psychiatrist who diagnosed him with a psychiatric shock and certified him unfit for work for 20 days. This prescription was renewed several times on account of serious depression. On 15 February 2000, the applicant lodged a detailed complaint with the Istanbul Court of First Instance and asked to be provided with the reasons of his remand in police custody. On 16 February 2000 the applicant was informed that he was to be suspended until the close of the criminal investigation on account of his relations with individuals who had been convicted of blackmail, looting and unlawful imprisonment as members of an organised gang.

On 19 February, the factory where he worked as a doctor under an individual contract terminated his employment, on account of his failure to give the staff care and attention. The letter also referred to the fact that he was under psychiatric treatment. On 9 March 2000, the prosecuting authorities discontinued the case against the applicant.

On 12 July 2000, he was reinstated in his post at the security police. He was however on leave on account of aggravated psychosomatic symptoms, until 3 January 2002 when he was hospitalised.

On 28 February 2002, he retired early on health grounds, the diagnosis being "persecution-type hallucination under serious depression". He was then admitted several times as a psychiatric patient to the neuropsychiatry department of Bakırköy University Hospital.

On 9 January 2001, the applicant lodged a complaint with the Fatih prosecutor's office against five police officers for abuse of power and ill-treatment. The prosecutor's office asked for the permission to open an investigation to the administrative committee of the Istanbul prefecture. On 6 June 2001, the administrative committee refused the request on the grounds that no fault could be imputed to the police officers. On 21 November 2001, the Istanbul administrative court rejected the applicant's opposition. On 12 December 2001, the prosecutor's office discontinued the proceedings. On 20 March 2002, the Istanbul Assize Court rejected the applicant's opposition.

### Complaints

The applicant complained about the humiliating and degrading treatment he was subjected to during his arrest and his remand in custody. He relied on Article 3.

Under Article 5 (1)(c) and (2), the applicant complained about his unlawful arrest as there were no plausible reasons to suspect him of having committed a crime, and he was not informed of the charges brought against him.

The applicant finally complained that the exposure to his colleagues whilst being handcuffed amounted to a violation of Article 8.

### Held

The Court held that the degrading treatment suffered by the applicant, who had been made to wear handcuffs during his arrest, while searches were being carried out and during his remand in custody, amounted to a violation of Article 3.

The Court further held that the applicant's claim under Article 5 was late and had to be rejected according to Article 35(1) and (4) of the Convention.

The Court further held that it was not necessary to examine separately the complaint under Article 8, as it was identical to the complaint under Article 3.

The Court awarded the applicant EUR 2,000 for pecuniary and non-pecuniary damage together, and EUR 1,000 for costs and expenses.

### Commentary

The Court recalled that the appreciation of the seriousness of ill-treatment was relative and depended on the circumstances of the case. It further recalled that treatment could be qualified as inhuman or degrading only when the occasioned suffering or humiliation went beyond those which legitimate treatment unavoidably caused.

The Court examined whether the aim was to humiliate the applicant, recalling that a victim could feel humiliated even if others did not consider that to be the case, and if the measures had an effect on his personality that was incompatible with Article 3.

The Court noted that the applicant had no psychopathologic history, and that he clearly explained the humiliation he underwent. The Court further observed that in the present case, it could be reasonably alleged that a link of causality existed between the contentious treatment and the psychopathological problems of the applicant that were diagnosed two days after his release.

The Court recalled that handcuffing was normally not found to violate Article 3 since it was linked to a lawful arrest or detention, and did not lead to use of force or public exposure beyond what is considered as reasonable in the circumstances of the case. However, it had to be determined whether handcuffing was justified in light of the behaviour of the interested person, who could resist the arrest, flee, use force, or suppress evidence. As nothing in the file justified the handcuffing, and as the Government did not present any explanation concerning this element, the Court concluded that the public exposure of the handcuffed applicant during his arrest and the searches was not necessary.

It subsequently held that this exposure aimed at creating feelings of fear, humiliation and inferiority meant to humiliate the applicant and possibly break his moral resistance. The Court concluded that the handcuffing of the applicant, in the particular circumstances of the case, constituted a degrading treatment amounting to a violation of Article 3.

### ***Pruneanu v. Moldova***

(6888/03)

**European Court of Human Rights:** Judgment of 16 January 2007

*Ill-treatment while in police custody - Prohibition of torture and ill-treatment – Right to an effective remedy – Articles 3 and 13*

#### Facts

The applicant, Ion Pruneanu, is a Moldavian national who was born in 1972 and lives in the village of Şipoteni, Moldova.

On 10 May 2001, he was arrested by six police officers at his home, as he was suspected of having stolen some farm animals. He was taken to the office of the village police inspector, in the Şipoteni Local Council building. He was later taken by car to Călăraşi police station, from where he managed to escape. He was, at that time, severely injured.

According to the applicant, he was severely beaten in the Local Council building by two police officers until he lost consciousness, and was then taken to Călăraşi police station. According to the Government, the applicant jumped out of the car which took him to the Călăraşi police station, and sustained injuries from the impact with the road.

Several days later the applicant went to hospital. A medical report dated 14 May 2001 states that he had several injuries to his head and body, such as bruises, swellings, scratches and wounds, and that he suffered from a paralysis of the left side of his face, head trauma and concussion, and a perforation of the left tympanic membrane (ear drum). The report concluded that the injuries had been inflicted by blows with blunt objects, possibly on 10 May 2001.

The applicant was arrested a second time by the police from which he was hiding, late in the evening of 10 July 2002. Together with an accomplice, he had entered an apartment situated on the third floor of an apartment building to steal money. After its occupant started shouting for help, they had jumped off the balcony. The applicant, who hurt his leg, was arrested and taken to the Buiucani Police Station.

The applicant alleged that at the police station, he was further subjected to torture, and asked to confess to another 20-30 thefts which he had not committed. The Government submitted that all his injuries had been sustained by his leap. On 11 July 2002 at 12.21 p.m. an ambulance was called to the Police Station and the applicant was then hospitalised at the Emergency Hospital. He could not walk and was transported on a stretcher. A medical report dated 12 July 2002 stated that he had a head trauma with concussion, several bruises and injuries on his face, chest trauma, fractures of three ribs, the left tibia and a finger of his left hand, and contusion of the soft tissues on his neck and knees.

On 30 September 2002, the applicant lodged a complaint with the Ombudsman's Office about the alleged ill-treatment on 10 May 2001 and annexed a copy of the medical certificate of 14 May. The complaint was forwarded to the Ungheni County Prosecutor's Office, which dismissed it without conducting any

investigation. The applicant appealed before the Prosecutor General's Office, which ordered a re-examination of his complaint.

Thereafter, the Ungheni County Prosecutor's Office heard some of the police officers involved in the first arrest of the applicant. They stated that he had resisted arrest and further jumped out of the car. On 8 December 2002, the Prosecutor's Office dismissed the applicant's complaint. The applicant challenged this decision before the Prosecutor General's Office, who quashed it and requested that a second investigation be carried out.

Between 11 and 24 February 2003, a prosecutor led various interrogations. Five of the police officers who had participated in the first arrest stated that the applicant had not been subjected to any violence, except at the time of the arrest when his hands had been tied behind his back. Their versions of the facts were slightly divergent on the number of police officers that were present in the car.

On 25 February 2003, the applicant's complaint was dismissed on the ground that he had sustained his injuries when jumping out of the car and that there was no evidence that he had been ill-treated.

On 6 August 2002, the applicant complained to the Prosecutor General's Office about his alleged ill-treatment on 10-11 July 2002. His complaint was re-directed to the Buiucani Prosecutor's Office, which dismissed the applicant's complaint while finding that his injuries had been caused by his jumping from the third floor. The applicant challenged this decision before the Prosecutor General's Office, which quashed it on 12 November and ordered a second investigation. The Prosecutor General's Office also noted that while it was found that the applicant had sustained his injuries on the night of 10 July 2002, an ambulance was not called from him until 11 July 2002 at 12.21 p.m.

Between 20 and 27 November 2002 the Buiucani Prosecutor's Office questioned a number of witnesses. According to the witness statements, the applicant, after having jumped from the third floor, had tried to run away but was stopped by the neighbours. The interrogated police officers alleged that an ambulance had been called as he had complained about pain in his legs. A paramedic declared that the applicant did not complain of having been beaten up and had no visible injuries.

On 2 December 2002, a forensic report further ordered by the prosecutor stated that the injuries were inflicted by blows with blunt objects and could have been

caused as a result of a fall from the third floor, if his body had hit hard objects. On 1 December 2002, the applicant's complaint was dismissed on the ground that he had sustained his injuries when jumping from the third floor of an apartment building. The prosecutor relied mainly on the declarations of the police officers that no violence had been inflicted on the applicant during his detention and on the forensic report.

### Complaints

The applicant complained under Article 3 of the Convention that he was ill-treated by the police on 10 May 2001 and 10 July 2002. He also brought a complaint under the procedural head of the same Article regarding the failure of the domestic authorities to properly investigate his complaints about ill-treatment.

The applicant argued that due to the outcome of the criminal investigation in respect of his ill-treatment, he was prevented from bringing a civil action for damages against the police officers. He thus did not have an effective remedy before a national authority in respect of the breaches of Article 3 and claimed a violation of Article 13 – the right to an effective remedy.

### Held

The Court held by six votes to one that, regarding the first complaint related to the events of 10 May 2001, the Government had not provided a plausible explanation for the applicant's injuries and concluded that they were the result of inhuman and degrading treatment while in police custody. There had thus been a violation of Article 3.

The Court also held by six votes to one that the authorities had failed to conduct a proper investigation into the applicant's allegations of ill-treatment on 10 May 2001, in violation of Article 3 under its procedural head.

The Court held by four votes to three that there had been no violation of Article 3 in respect of the alleged subjecting of the applicant to inhuman and degrading treatment on 10 and 11 July 2002.

The Court however found a violation of Article 3 on the ground that the State authorities failed to conduct a proper investigation into the applicant's allegations of ill-treatment on 10 and 11 July 2002.

The Court further held that the applicant did not have an effective remedy under

domestic law to claim compensation for his ill-treatment as regards events that took place on 10 May 2001 and accordingly there had been a violation of Article 13.

The Court awarded the applicant EUR 8,000 for non-pecuniary damage and EUR 1,400 for costs and expenses.

#### Commentary

The Court recalled that Article 3 enshrines one of the most fundamental values of democratic societies, and that even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibited torture and inhuman or degrading treatment or punishment in absolute terms.

In assessing evidence, the Court has generally applied the standard of proof “beyond reasonable doubt”. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, strong presumptions of fact will arise in respect of injuries occurring during such detention. The burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation of how the injuries were caused.

Regarding the second incident of ill-treatment, it was disputed whether the jump was the cause of all the applicant’s injuries. The final report of 2 December 2002 stated that they had been inflicted by blows with blunt objects, but acknowledged that they might have been caused by a fall from the third floor, if the applicant’s body had hit hard objects, which the Moldovan prosecutors did not finally conclude.

Given the deficiency of the inquiry and the failure of the police to have the applicant medically examined immediately after his fall or jump, the Court was not able to determine with certainty the manner in which he sustained his injuries. At the same time, the Court could not ignore that the applicant had jumped from a considerable height. Given that fact, and despite the matters of concern described, the Court could only conclude that it had not been established beyond reasonable doubt that the injuries sustained by the applicant were the result of ill-treatment.

## ***Sheydayev v. Russia***

(65859/01)

**European Court of Human Rights:** Judgment of 7 December 2006

*Ill-treatment in police custody – Prohibition of torture and inhuman and degrading treatment – Articles 3, 5 and 6*

### Facts

The applicant, Roman Yakhyabekovich Sheydayev, is a Russian national who was born in 1978 and lives in Derbent (Russia). At the time of the events he was performing contractual military service in a military unit in the Republic of Dagestan.

On 21 December 1999, he was arrested, on suspicion of having committed acts of violent hooliganism, and taken to police custody. On 24 December 1999, when he was released from police custody and accompanied to his military unit, the applicant was examined by a doctor of the medical unit who noted a scabbed abrasion of skin and soft tissue bruises on the head and body.

A criminal investigation was initiated in response to the applicant's complaints of ill-treatment by the police officers. The applicant submitted that, while at the police station from 21 to 24 December 1999, he was continuously beaten up by five police officers who tried to force him to confess to having committed the offence they were investigating. The applicant finally conceded to their demands and wrote a confession letter. On 21 January 2005 the Derbent Town Prosecutor found that, apart from the medical report, the inquiry had failed to obtain sufficient evidence to implicate the policemen.

On 27 May 2000 the Makhachkala Garrison Military Court found the applicant guilty of hooliganism committed as part of a group and gave him a two-year suspended prison sentence. The court considered his allegations of ill-treatment in police custody and accepted the findings of the medical report of 24 December 1999. However, it found that the applicant failed to submit persuasive evidence establishing the causal link between his injuries and the actions of the policemen and to prove his version of events. He was later pardoned on the basis of an amnesty act.

### Complaints

The applicant submitted that he had been subjected to ill-treatment by

police officers while he was kept in custody, in violation of Article 3 of the Convention.

The applicant complained under Article 5 of the Convention that his arrest on 21 December 1999 had been effected without reasonable suspicion, that there had been no transcript of his arrest drawn up and that his arrest had lasted more than the 72 hours permitted by the criminal procedure law.

The applicant also complained under Article 6 of the Convention that the presiding judge in the Makhachkala Garrison Martial Court had not been impartial because of alleged bribery involving the judge and his father.

#### Held

The Court held unanimously that there had been a violation of Article 3 of the European Convention on Human Rights concerning the ill-treatment of the applicant in police custody.

The Court did not decide whether there had been a violation of Article 5 of the Convention because it considered that this part of the application was introduced too late. Accordingly, it rejected this complaint pursuant to Article 35 of the Convention.

The Court also rejected the applicant's complaint of the impartiality of the presiding judge pursuant to Article 35 of the Convention. It observed that the applicant had failed to exhaust the domestic remedies available to him.

The Court awarded the applicant EUR 20,000 by way of non-pecuniary damages.

#### Commentary

The Court recalled that it has held on many occasions that the authorities have an obligation to protect the physical integrity of persons in detention. Where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the state to provide a plausible explanation of how those injuries were caused. Otherwise, torture or ill-treatment may be presumed in favour of the claimant and an issue may arise under Article 3 of the Convention.

The Court noted that neither the parties nor the domestic authorities disputed the validity of the medical report drawn up on 24 December 1999 which established

the presence of various injuries to the applicant's head and chest. It further noted that no plausible explanation of how those injuries were caused was advanced by either the authorities at the domestic level, or the Government in the proceedings before the European Court of Human Rights.

In view of those circumstances, the Court concluded that the Government had not satisfactorily established that the applicant's injuries were caused otherwise than, entirely, mainly, or partly, by the treatment he underwent while in police custody.

The Court found that the medical report of 24 December 1999 corroborated the applicant's statements regarding the physical pain and suffering which were inflicted on him intentionally. Furthermore, it found that the acts complained of by the applicant were such as to arouse in him feelings of fear, anguish and inferiority capable of humiliating and debasing him and possibly breaking his physical and moral resistance.

Having regard to all the circumstances of the case, such as the duration of the treatment, its physical or mental effects, the sex, age and state of health of the victim, the Court concluded that, taken as a whole and having regard to its purpose and severity, the ill-treatment at issue amounted to torture and held unanimously that there had been a violation of Article 3.

### ***Alsayed Allaham v. Greece***

(25771/03)

**European Court of Human Rights:** Judgment of 18 January 2007

*Police brutality - Prohibition of torture/inhuman & degrading treatment - Right to an effective remedy – Articles 3 and 13*

#### Facts

The applicant, Mr Mhn Ghassan Alsayed Allaham, is a Syrian national who was born in 1962 and lives in Athens, Greece. Since 1986, the applicant has lived and worked in Greece. He is married to a Greek woman and possesses a valid stay and work permit.

On 8 September 1998, the applicant and two other Syrian nationals accompanied a friend to a police station to report a robbery. Having waited for a long time, the

applicant started to complain. He was then punched and slapped on his head by a police officer while another police officer held him down. Other police officers to whom he turned for help insulted him and locked him in an empty office for three hours. After his release, the applicant immediately went to hospital where he was examined by a doctor and given a medical certificate attesting to a scratch on his left temple and to his left eardrum being perforated. The applicant currently suffers from hearing loss in both ears and vertigo which have resulted in a significant reduction in his ability to work.

On 9 September 1998, the applicant filed a criminal complaint against two of the police officers involved and the Chief of the police station. Following a preliminary inquiry, criminal charges were dropped against one police officer and the Chief of the police station. On 14 September 1998, the applicant reported the incident to the Minister of Public Order. On 10 July and 20 November 2000, disciplinary measures were taken against the two police officers, who were both fined after the Chief of the Greek Police found that they had caused bodily harm to the applicant.

On 19 February 2002, the first instance court found the second police officer guilty of serious bodily harm and sentenced him to four months' imprisonment. He was, however, acquitted on appeal on 18 December 2002 on the basis of statements by five eye-witnesses, three of whom were his colleagues, testifying that the accused had not hit the applicant and that the applicant was already hard of hearing before the incident.

Following the Court of Cassation's dismissal of the applicant's appeal on 24 February 2003, the applicant brought civil proceedings against one of the police officers on 4 September 2003, which were also later rejected. The applicant appealed against that decision and the proceedings were still pending at the time of the judgment.

### Complaints

The applicant complained that he had been subjected to acts of police brutality which inflicted on him great physical and mental suffering amounting to torture, inhuman and/or degrading treatment or punishment, in breach of Article 3 of the Convention.

The applicant therefore claimed that the Greek authorities had failed to investigate adequately as required by the procedural obligation imposed by Article 3, taken together with Article 13 of the Convention.

### Held

The Court held unanimously that there had been a violation of Article 3 of the European Convention on Human Rights as regards the ill-treatment of the applicant at the hands of the police.

The Court did not consider it necessary to examine separately the complaint that there had been a failure to comply with the procedural obligation imposed by Article 3, taken together with the complaint under Article 13.

The Court awarded the applicant 4,000 EUR in respect of pecuniary damage, EUR 20,000 in respect of non-pecuniary damage and EUR 3,000 for costs and expenses.

### Commentary

The Court recalled that, where a person was in detention or otherwise under the control of the police, any injury would give rise to a strong presumption that that person was subjected to ill-treatment.

The Court observed that the Government did not dispute the chronological order of events, namely that the applicant was at the police station from 7 to 11 p.m. on the day of the incident, nor did they dispute the validity of the medical reports. Accordingly, the Government was obliged to give a plausible explanation of how the applicant's injuries arose.

The Court stated that no serious effort had been made to discover what had really occurred to prove that the applicant's injuries were caused other than by the treatment he underwent while he was under the control of the police officers. Furthermore, it considered that it was not sufficient for the Government to refer to the acquittal of the accused police officers as a means to discharge itself of the burden of proof. The Court particularly noted that the only police officer to have been committed to trial was acquitted solely on the basis of statements by five eye-witnesses, three of whom were his colleagues.

The Court observed that the applicant was examined by a State doctor no later than an hour after he had left the police station and that there is nothing in the case file or the parties' submissions to suggest that the injuries described in the medical reports had been inflicted either before or just after his stay at the police station.

The Court concluded that weight should be given to the judgment of 19 February

2002 finding the accused police officer guilty as well as to the acknowledgment by the Chief of the Greek Police that both police officers had caused bodily harm to the applicant. Accordingly it found a violation of Article 3.

## Right to liberty & security

### *Chitayev and Chitayev v. Russia*

(59334/00)

**European Court of Human Rights:** Judgment of 18 January 2007

*Prohibition of torture – Right to liberty and security – Right to an effective remedy – Articles 3, 5, 8 and 13 of the Convention, and Article 1 of Protocol No. 1*

#### Facts

The applicants, Arbi Salaudiyevich Chitayev and Adam Salaudiyevich Chitayev, are brothers of Russian nationality who were born in 1964 and 1967 and live in Germany and in the Irkutsk region (Russia), respectively.

The applicants were both living in Chechnya in early October 1999, when the hostilities started again between the Russian armed forces and the Chechen armed groups. In October 2000, the first applicant's flat was destroyed. The applicants moved their families and values from nearby Grozny to their parent's house, in Achkoy-Martan.

According to the applicants, on 15 January 2000 officers searched the house for firearms without producing any warrants or official justification. They seized a telephone set. On 18 January 2000, the second applicant complained to the head of the Temporary Office of the Interior of the Achkhoy-Martan District (the Achkhoy-Martan VOVD) that the search had been unlawful. The telephone set was returned in March 2000.

On 12 April 2000, several officers searched the house again, without producing an official warrant. They seized several items of electronic equipment and personal documents of some of the family members. They then asked the applicants to come to the Achkhoy-Martan VOVD for a few hours to help them to deal with paperwork. The applicants were then told that they were under arrest and were beaten. On the same day, their house was searched again and all their electronic material was seized.

Between 12 and 28 April 2000, the applicants were detained in the Achkhoy-Martan VOVD, where they were questioned about their involvement in the activities of the Chechen rebel fighters and in kidnappings for ransom, which they denied. They were subjected to various forms of torture and ill-treatment during the detention and the interrogations, such as electric shocks, repeated beatings, and strangulation. They were detained in unheated and damp cells.

On 28 April 2000, the applicants were beaten and threatened with death while transferred to another detention centre, the Chernokozovo SIZO. They were not subjected to any medical examination upon their admission, as prescribed by the legislation. They were again questioned and submitted to various tortures. Their lawyer was only given access to them once, and in the presence of a police officer who only allowed him to ask them how they were in Russian.

On 19 September 2000, the applicants were brought back to Achkhoy-Martan and informed that they had been charged with kidnapping and participation in an unlawful armed group. On 5 October 2000 they were released subject to a written assignment to residence.

On 6 October 2000 they were brought by their relatives to the Achkhoy-Martan hospital, where they were diagnosed with several traumas, injuries, chronic diseases such as pneumonia, and post-traumatic stress disorder, which the doctors stated to have apparently been sustained between April and October 2000, in the Chernokozovo SIZO.

In letters dated 9 October 2000, the prosecutor's office informed the applicants that criminal proceedings opened against them had been discontinued, as their guilt had not been proven, and that they had therefore been relieved of their assignment to residence.

From 12 April 2000 onwards, the applicants' relatives, further joined by the applicants, and supported by human rights NGOs such as the Memorial Human Rights Centre, applied repeatedly to various official bodies concerning the searches in their house and seizure of their property, as well as the applicants' arrest and detention. It appeared that the applicants had been arrested in connection with criminal charges brought against them for kidnapping of Russian soldiers for ransom and participation in an illegal armed group. In the context of these proceedings, "an inspection of the scene of the incident" had been carried out in their house, in accordance with the legislation. The seized items had been attached to the case file of the criminal investigation, which was being conducted

by the Prosecutor General's Office for the Northern Caucasus.

On 18 October 2000 the republican prosecutor's office informed the applicants' brother that the division of internal security of the Achkhoy-Martan VOVD had commenced an internal inquiry into the seizure and destruction of his brothers' equipment.

On 5 October 2001 the applicants complained to the republican and the district prosecutor's offices about the severe ill-treatment of the applicants and the procedural violations during their detention. In early 2002 all male members of the Chitayev family received a summons to appear at the district prosecutor's office on 7 January 2002. According to the second applicant, the prosecutor and an investigator proposed that he should write a statement withdrawing all claims against the Achkhoy-Martan VOVD and, if this refused, they threatened to re-open the criminal proceedings against both applicants.

By letter of 7 January 2002, the investigator of the district prosecutor's office wrote to the applicants, dispensing with criminal proceedings in connection with their allegations of ill-treatment. No copy of the decision was enclosed. The applicants requested a copy but were told that the investigator was not obliged to forward a copy of such decision to a person who had sought the institution of proceedings.

On 14 March 2002, the applicants challenged the decision before the republican prosecutor. On 18 March 2002, the applicants were informed that the district prosecutor's office had decided not to open criminal proceedings in the absence of evidence of a crime in the actions of the personnel of the Achkhoy-Martan VOVD. The letter further stated that the second applicant had denied that "illicit methods of investigation" had ever been applied to him, whilst the first applicant could not be questioned because he had left the Chechen Republic.

On 6 May 2002, the republican prosecutor's office informed the applicants that an internal inquiry had been carried out and the decision to dispense with criminal proceedings was well-founded and lawful, as their complaints were found to be unsubstantiated.

The proceedings were still pending at the date of judgment and some investigative steps were taken in respect of the second applicant in 2005.

### Complaints

The applicants complained that they had been subjected to torture and inhuman and degrading treatment while in detention and that the State had failed to conduct a proper investigation in connection with their allegations of ill-treatment. They relied on Article 3.

They further complained under Article 5(1) (c) of the Convention that they had been unlawfully arrested. They also relied on Article 5(2) of the Convention, stating that they had not been promptly informed of the reasons for their arrest and detention.

The applicants further claimed a violation of Article 5(3) of the Convention that there had been no grounds for their continued detention and that they had been denied a right to be released pending trial. They also complained that they had been unable to have the lawfulness of their detention reviewed by a court, as they had been held *incommunicado* and had had no contacts with their lawyer, in breach of Article 5 (4) of the Convention.

The applicants also complained under Article 5 (5) of the Convention that they had been deprived of an opportunity to seek compensation for their detention.

The applicants alleged that the absence of effective remedies in respect of the violations of their rights secured by Articles 3 and 5 amounted to a violation of Article 13 of the Convention.

They also complained that their home was unlawfully searched and their property unlawfully seized, relying on Article 8 and Article 1 of Protocol No. 1 to the Convention.

They lastly argued that the State had breached its obligations under Article 38(1) of the Convention, as it had not submitted the entire file of the criminal case.

### Held

The Court upheld the Government's preliminary objection as to the non-exhaustion of domestic remedies in so far as it related to the applicants' complaints under Article 8 and Article 1 of Protocol No. 1 to the Convention and held that it was unable to consider the merits of these complaints.

The Court held that it was unable to consider the merits of the applicants' complaint under Article 3 concerning the conditions of their detention, as it has

been lodged out of time (non-compliance with the six-month rule).

The Court held that Article 3 had been violated, in view of the treatment the applicants were subjected to while in detention, and considering the failure to provide an effective investigation into the applicants' allegations of ill-treatment.

The Court found that the applicants' unacknowledged detention on remand between 12 and 17 April constituted a violation of Article 5.

The Court also held that there had been a violation of Article 5(4), as the applicants were unable to take proceedings to challenge the lawfulness of their detention during the relevant period.

The Court held that there had been no violation of Article 5(1)(c) on account of the applicants' detention on remand between 17 April and 18 June 2000, but that there had been a violation of the same Article on account of the applicants' detention on remand between 19 June and 4 October 2000.

The Court held that it was not necessary to make a separate finding under Article 5(2) as regards the applicants' detention on remand between 17 April and 4 October 2000.

The Court further concluded that there had been a violation of Article 5(3) as regards the applicants' right to release pending trial during their detention on remand between 17 April and 4 October 2000.

The Court also found that applicants had been prevented from seeking compensation for their detention on remand, in violation of Article 5 (5).

The Court found that there had been a violation of Article 13 as regards the denial of any effective domestic remedy in respect of the ill-treatment of the applicants in violation of Article 3, but that no separate issue arose under Article 13 in respect of Article 5.

Finally, the Court held that there had not been a failure to comply with Article 38(1) (a), since the Government had submitted a number of documents relating to the search and seizure, the applicants' detention and their allegations of ill-treatment and conditions of their detention. Some documents had not been submitted, but the Court had already drawn inferences in this connection and

found violations of the respective Convention provisions.

The Court awarded the applicants EUR 35,000 each for non-pecuniary damage, and EUR 7,629.90 jointly for costs and expenses (EUR 8,344.90 as claimed, less EUR 715 received by way of legal aid).

### Commentary

In relation to Article 3, the Court reiterated its well-established case-law that in respect of a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary diminished human dignity and was an infringement of the right enshrined in Article 3. The Court found that in the instant case the existence of physical pain or suffering was attested, and that they were inflicted intentionally, in particular with a view to obtaining from them confessions to the imputed offence. The acts complained of were such as to arouse in the applicants feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical and moral resistance.

It had to be determined whether the “pain or suffering” inflicted on the applicants could be defined as “severe”. The Court recalled that this term was relative and depended on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. In the instant case, the applicants were indisputably kept in a permanent state of physical pain and anxiety owing to their uncertainty about their fate and to the level of violence to which they were subjected throughout the period of their detention. The Court considered that such treatment was intentionally inflicted on the applicants by agents of the state acting in the course of their duties, with the aim of extracting from them a confession or information about the offences of which they were suspected. In these circumstances, the Court concluded that, taken as a whole and having regard to its purpose and severity, the ill-treatment at issue was particularly serious and cruel and capable of causing “severe” pain and suffering and amounted to torture, within the meaning of Article 3 of the Convention.

## Right to a fair trial

### *Türkmen v. Turkey*

(43124/98)

**European Court of Human Rights:** Judgment of 30 January 2007

*Torture whilst in police custody – Prohibition of torture/inhuman & degrading treatment - Right to a fair trial – Articles 3 and 6*

#### Facts

The applicants, Can Ali Türkmen and his wife Petek Türkmen, are Turkish nationals who were born in 1969 and 1971 and live in Cologne (Germany).

The applicants were arrested on 6 January 1994 on suspicion of belonging to the illegal armed organisation, the TİKB (*Türkiye İhtilalci Komünistler Birliği* – the Turkish Union of Revolutionary Communists), and were taken into police custody in the anti-terrorist wing of the security police headquarters in Istanbul. On 17 January 1994 the applicants were examined by Dr Apaydın, a forensic medical expert, who found no traces of violence on their bodies.

The applicants were placed in pre-trial detention and, on their arrival in Sağmalcılar Prison on 19 January 1994, were examined by the prison doctor. According to the medical report drawn up on that date, Petek Türkmen had pains in both shoulders, armpits and shoulder blades, numbness to the hands and back pain. Can Ali Türkmen had motor function problems, numbness in the shoulders and arms and bruising, in particular to the buttocks and the soles of the feet. He had a number of scabbed wounds on his right leg.

On 24 January 1994 the applicants were examined by a doctor from the Eyüp Institute of Forensic Medicine. The doctor's report stated that Petek Türkmen had a yellowish bruise on the left hand; partial lack of movement in the left shoulder, elbow, wrist and fingers; and numbness and a tingling sensation, loss of sensation and pain to both sides of the body, more pronounced on the left side. As for Can Ali Türkmen, the doctor observed bruising around the shoulder blades, the right elbow, the right wrist and the left hand; bruising to the malleolus<sup>4</sup> and the buttocks; and pain, accompanied by a significant degree of incapacity and numbness, to the left shoulder, elbow and wrist.

4 The rounded projection on the ankle, on both sides

The applicants lodged a complaint against Dr Apaydın for abuse of power in the exercise of his duties. The proceedings were terminated for lack of evidence in June 1994, but the applicants subsequently learned through the Medical Council that the doctor in question had been barred from practising for having, during the same period, failed to disclose signs of ill-treatment of prisoners.

In February 1994, the applicants lodged a complaint against the police officers who had been on duty during their time in police custody, alleging that they had been tortured. They said that they had been subjected to so-called “Palestinian hanging”, consisting in being hung by the arms, had been sprayed with water at high pressure on sensitive parts of the body such as the mouth, the eyes and the genitalia, and had been subjected to *falaka* which involves administering blows to the soles of the feet. Mrs Türkmen also said that she had been threatened with rape. Following the applicants’ complaint an investigation was opened, in the course of which evidence was taken from the accused persons and from Dr Apaydın. The second applicant was examined by a doctor.

On 14 June 1999 the Assize Court acquitted the four police officers for lack of evidence. The applicants lodged an appeal on points of law. On 28 June 2000 the Court of Cassation ruled that the prosecution had become time-barred.

In the meantime, in April 1997, the applicants were found guilty of membership of an illegal organisation and sentenced to 12 years and six months’ imprisonment. The state security court based its decision on evidence such as the statements of the applicants’ co-defendants and the impugned statement by the second applicant. The convictions were upheld by the Court of Cassation.

In December 2000 the applicants were transferred to an F-type prison, which was the scene of a number of riots giving rise to violent clashes between police officers and prisoners. In protest at these events a number of prisoners, including the applicants, went on hunger strike. As a result, the applicants contracted Wernicke-Korsakoff syndrome and were granted temporary release on medical grounds in December 2001 and February 2002. Mrs Türkmen was pardoned by the President of the Republic in October 2002 and her husband in March 2003. The applicants then moved to Germany, where they applied for asylum.

### Complaints

The applicants complained that they had been tortured by police officers in an attempt to extract confessions from them. They further alleged that they had been convicted following unfair proceedings. They relied on Articles 3 and 6.

### Held

The Court held unanimously that there had been a violation of Article 3 of the European Convention on Human Rights on account of the torture to which the applicants had been subjected in police custody and on account of the circumstances which had resulted in the prosecution of the presumed perpetrators of the torture becoming time-barred.

The Court considered unanimously that there had been a violation of Article 6 (1) of the Convention on account of the lack of independence and impartiality of the state security court, and considered that it was not necessary to examine the applicants' other complaints regarding the unfairness of the proceedings.

The Court awarded the applicants 25,000 euros each for pecuniary and non-pecuniary damage and EUR 3,000 jointly for costs and expenses, less the EUR 660 already received from the Council of Europe in legal aid.

### Commentary

Regarding the treatment to which the applicants were subjected, the Court observed that Dr Apaydın had not noted any traces of violence to the applicants' bodies when he had examined them. Two days later, however, the prison doctor had recorded numerous injuries, and his report had been endorsed by the Institute of Forensic Medicine. As the applicants had not undergone any medical examination when they were first deprived of their liberty, it could not be claimed that their injuries had been sustained prior to their arrest. Moreover, they had remained completely at the mercy of the officers questioning them, since they had been taken into police custody on 6 January 1994 and had not had access to their lawyer until 11 January.

The Court reiterated that, where injuries occurred while an individual was in detention, it was incumbent on the Government concerned to provide a plausible explanation as to how the injuries in question had been caused and to adduce evidence establishing facts that cast doubt on the applicants' allegations. In the absence of any plausible explanation from the State Party's Government, the Court considered that the medical examination of 17 January 1994 had not been conducted in accordance with the proper procedures and that the injuries noted in the two subsequent reports had resulted from treatment for which Turkey bore responsibility. The Court observed in that connection that the applicants' injuries were consistent with the ill-treatment they had alleged.

In view of all the evidence before it, the Court could not but find it established

that the applicants had been subjected by those questioning them at least to ill-treatment such as Palestinian hanging and *falaka*, which in the present case could only have been inflicted intentionally in order to extract confessions or information from the applicants.

Regarding the effectiveness of the investigation, the Court considered that the proceedings at issue could not be regarded as having been conducted with reasonable expedition; neither had the State Party's authorities taken the positive steps required by the seriousness of the circumstances to ensure that the proceedings were brought to a successful conclusion before the prosecution became time-barred.

Regarding the applicants complaints of the violation of their right to a fair trial, the Court considered it understandable that the applicants, who had been charged with serious offences, should have feared appearing before a state security court with a military judge on its bench. They had had good grounds to fear that the Istanbul State Security Court would be unduly influenced by considerations unrelated to the nature of the case.

### ***Markovic and Others v. Italy***

(1398/03)

**European Court of Human Rights:** Judgment of 14 December 2006

*State responsibility for NATO actions – Right to a fair trial – Article 6*

#### Facts

The ten applicants are all nationals of the former Serbia and Montenegro and close relatives of people who were killed during the Kosovo conflict when an air strike on the headquarters of *Radio Televizije Srbije* (RTS) in Belgrade on 23 April 1999 by the NATO alliance resulted in 16 deaths.

The application concerned an action in damages brought by the applicants in the Italian courts in respect of the deaths of their relatives as a result of air strikes against the Federal Republic of Yugoslavia.

The applicants brought an action in damages in the Rome District Court, as they considered that Italy's involvement in the relevant military operations had been more extensive than that of the other NATO members in that Italy had provided

major political and logistical support, such as the use of its air bases by aircraft engaged in the strikes on Belgrade and RTS. The defendants to the action were the Prime Minister's Office, the Italian Ministry of Defence and the NATO Allied Forces Southern Europe (AFSOUTH) Command.

The Prime Minister's Office and the Italian Ministry of Defence applied to the Court of Cassation for a preliminary ruling on the issue of jurisdiction under Article 41 of the Code of Civil Procedure. In a judgment of 8 February 2002 which brought the applicants' action to an end, the Court of Cassation held that the Italian courts had no jurisdiction because Italy's decision to take part in the air strikes had been a political one and could not, therefore, be reviewed by the courts.

The application at the European Court of Human Rights was lodged on 6 December 2002 and declared partially inadmissible on 12 June 2003. On 28 February 2005 the Government of Serbia and Montenegro requested permission to intervene as a third party and, on 28 April 2005, the Chamber relinquished jurisdiction in favour of the Grand Chamber. On 21 June 2005 the United Kingdom Government was given permission to submit written observations.

### Complaints

The applicants complained, under Article 6 of the Convention - the right to a fair hearing - read in conjunction with Article 1 (obligation to respect human rights) that they were denied access to a court.

### Held

Judgment was given by the Grand Chamber of 17 judges. The Court held that there had been no violation of Article 6.

The Court made no award as to just satisfaction.

### Commentary

The Italian Government submitted that the applicants had not exhausted domestic remedies as they had failed to resume the proceedings against NATO. The Court said that no concrete example of a civil action being successfully brought against NATO had been provided so that it was not convinced by the Government's argument that the proceedings against NATO would have offered better prospects of success than those against the Italian State. It added that, once the applicants had brought a civil action in the Italian courts, there indisputably existed a "jurisdictional link" for the purposes of Article 1 of the Convention.

It ruled that Article 6 was applicable and dismissed the Italian Government's preliminary objections.

The Court then reiterated that it was for the national authorities to interpret and apply domestic law and that this rule also applied where domestic law referred to rules of general international law or international agreements. The Court's role was confined to ascertaining whether the effects of such an interpretation were compatible with the Convention.

The Court noted that the Italian Court of Cassation's comments on the international conventions that had been cited by the applicants did not appear to contain any errors of interpretation and that Italian law permitted preliminary jurisdictional points to be raised. Accordingly, it was not possible to conclude from the manner in which the domestic law had been interpreted or the relevant international treaties applied that a "right" to reparation under the law of tort existed in circumstances such as those in the case before it.

As to the Court of Cassation's ruling, it did not amount to recognition of immunity, but was merely indicative of the extent of the courts' powers of review of acts of foreign policy such as acts of war. Consequently, the Court considered that the applicants' claims had been fairly examined in the light of the Italian legal principles applicable to the law of tort. The applicants had been afforded access to a court, but that access had been limited in scope, as it did not enable them to secure a decision on the merits. The Court accordingly held that there had been no violation of Article 6.

## Private & family life

### *Igor Dmitrijevs v. Latvia*

(61638/00)

**European Court of Human Rights:** Judgment of 30 November 2006

*Right to respect for correspondence – Right to freedom of thought, conscience and religion – Individual applications - Articles 5, 6, 8, 9, 14 and 34*

#### Facts

The applicant, Igor Dmitrijevs, is a "permanently resident non-citizen" of Latvia who was born in 1971 and lives in Riga, Latvia.

On 19 June 1999, he was arrested on suspicion of attempted aggravated sexual assault. He was taken into police custody in Riga police headquarters, where he was allegedly ill-treated. The next day, he was identified by his victim, placed on trial and convicted. Until 22 June, the applicant remained in the police headquarters' temporary isolation unit, in allegedly inhuman detention conditions.

On 22 June 1999, he was convicted before the court of first instance of Latgale in Riga city, which ordered that he be remanded in custody for two months in Riga Central Prison. The applicant lodged two requests for release on 28 June and 28 July 1999, which were unsuccessful.

On 19 July 1999, the applicant lodged a complaint alleging ill-treatment while in police custody before Riga regional prosecutor's office, which ordered the opening of an internal investigation. A letter dated 31 August informed the applicant that the investigation had been carried out and that the alleged facts had not been confirmed.

Between August 1999 and October 2000, the applicant lodged several requests for release before the Latgale district court, the Riga regional court and the general prosecutor's office, all of which were rejected. From 12 August 1999 onwards, the detention of the applicant was repeatedly prolonged. On 2 February, the Riga regional court decided to maintain the applicant in custody until the judgment was pronounced. On 14 September 1999, he also lodged a second complaint related to ill-treatment before the Riga regional court, which was rejected one week later.

On 15 November 1999, the applicant asked the Riga regional court prosecutor's office to authorise correspondence with his sister and his aunt, which was accepted. However, on three occasions between 10 February and 15 November 2000 the applicant applied to Riga Regional Court, in charge of the file, for permission to correspond with his mother; on each occasion, the application was refused.

On 4 July 2000, the applicant requested permission from the judge in charge of the case to take part in the religious ceremonies in the prison chaplaincy; the same day, a prison memorandum was sent to the regional court, explaining that the prison authorities "[could] not guarantee prisoners' isolation during the ceremonies". On 11 July, his request was rejected.

In March, May and July 2000, the applicant wrote three letters to the president of the republic. However, the judge in charge of the file refused to forward it in a letter dated 17 August, on the ground that only the competent court could assess the merits of a criminal case. The applicant lodged a complaint before the director of the judiciary department of the Ministry of Justice, who recognised the unlawfulness of the judge's behaviour and assured that the Ministry had taken measures regarding it.

On 27 February 2001, the Riga regional Court sentenced the applicant with three years and six months imprisonment for attempted sexual assault with aggravating circumstances. His conviction was upheld on appeal. On 5 March 2001, the judgment was notified to the applicant, in Russian, his mother tongue. The applicant lodged an appeal before the Criminal Affairs Chamber of the Supreme Court, which rejected it.

On 4 June 2001, he requested the president of the Supreme Court to authorise him to continue his correspondence with his mother; he was answered that this had already been authorised. On 2 August 2001, the competent judge of the criminal chamber however authorised it. The applicant appealed on points of law; his request was dismissed by the Senate of the Supreme Court on 14 December 2001.

During his detention, the applicant approached the European Court of Human Rights with a view to lodging an application. On 7 June 2000, the Registry of the Court sent him a letter accompanied by the documents required. The letter reached the applicant on 27 June in an envelope which had been opened and bore a prison stamp. The applicant requested several times the prison authorities to provide him with photocopies of certain documents from his case file, for forwarding to the European Court; his requests were first refused. On 21 July 2000, he was sent copies of two documents only. In August 2000 the applicant submitted his application form to the prison authorities for forwarding to the European Court. This document was however sent back to him.

On 15 September 2000, the regional court authorised his access to his case file. The applicant asked the prison administration to photocopy it integrally and to send it to the European Court. He was told in response that he had to pay for this himself.

The applicant sent three successive letters to the European Court, from October 2000 to January 2001, explaining that the prison authorities subsequently refused

to send his form to the Court “owing to lack of funds”. The Court received his application form on 15 March 2001.

On 13 November 2000, the deputy prison governor explained to him that, before writing to the Court, he had to obtain prior authorisation from the judge in charge of his criminal case. The applicant further submitted that the Court’s letters had been opened systematically. He complained to the chief of the prison directorate about the obstacles to his communication with the Court. His complaint was rejected.

In December 2002, the applicant was released.

### Complaints

The applicant complained that he had been subjected to ill-treatment while in police custody. He also complained of the conditions of his detention in the temporary isolation unit at police headquarters. He relied on Article 3 of the Convention.

He further argued that his detention had been unlawful, in violation of Article 5(1) of the Convention.

Under Article 6(1) of the Convention, he complained of the length and unfairness of the criminal proceedings against him.

He also complained that his right to respect for his correspondence had been violated, as regards the refusal of a correspondence with his mother and the refusal to forward his letters to the President of the Republic. He relied on Article 8 of the Convention.

He further argued that the prohibition from attending religious services in the prison chaplaincy amounted to a violation of Article 9 of the Convention.

He further complained under Article 14 of the Convention that he had been deprived of all possibilities to defend his rights, as a result of attitude of the national authorities towards him, of the fact that he was not assisted by a lawyer, and of the fact that the authorities replied to his letters in Latvian and not Russian, his mother tongue.

He finally relied on Article 34, complaining about the repeated refusals of the prison administration to send his application form and documents to the Court,

about the opening of his correspondence by the prison administration, and the refusal to provide him with photocopies of certain documents to join to his file.

Held

The Court upheld the Government's objection as related to the complaint under Article 3 and declared it inadmissible as being out of time: non-compliance with the six-month rule.

The Court further declared the complaints under Articles 5(1), 6(1) and 14 inadmissible as being manifestly ill-founded.

The Court held that there had been a violation of Article 8 on account of the ban on the applicant's corresponding with his mother during his detention.

The Court further held that the same Article had been violated on account of the opening and monitoring of the letters addressed to the applicant by the European Court of Human Rights.

The Court held that the ban on the applicant's attending the prison's religious service amounted to a violation of Article 9.

The Court held that there had been a violation of Article 34 as the authorities had repeatedly refused to forward the applicant's application form to the Court. It also found a violation of Article 34 as the deputy governor of the prison had made assertions to the effect that the applicant required the authorisation of the Latvian courts before writing to the Court.

There had however been no violation of Article 34 as to the refusal of the prison authorities to provide the applicant with photocopies of certain documents.

As the applicant had not submitted any claim for just satisfaction under Article 41, the Court found it unnecessary to make him any award.

Commentary

As to the ban on the applicant's writing to his mother, the Court noted that the applicant finally obtained the permission to write to her, and that moreover, it seemed that such an authorisation had been given prior to this demand. However, during the entirety of year 2000, he was unable to write to her and the Latvian authorities did not recognise the illegality of the situation or make reparations for the violation.

As the Government did not give precise explanations, the Court assumed that this ban was based on Article 53 of Decree no. 113 by the Minister of the Interior, which stated that prisoners' correspondence with their families was subject to permission from the authority responsible for the case. The Court reminded that in its case-law regarding Latvia, it had already expressed strong doubts about this provision. It did not comply with the requirements of Article 8 that any interference prescribed by law, and moreover the law was too vague and allowed the Latvian authorities too great a margin of discretion.

The Court concluded that the interference in the applicant's right to respect for his correspondence was not justified by the law. This sole conclusion amounted to a violation of Article 8.

The Court noted that the opening and the monitoring of the applicant's correspondence constituted a breach in his right to respect for his correspondence, and had therefore to be analysed under Article 8 rather than under Article 34.

The Court held that such an interference in this right was not justified by the law, and amounted to a violation of Article 8.

The Government alleged that this behaviour was in accordance with the Decree No. 113. The Court held that even if this decree could be considered a 'law' authorising the automatic and unconditional monitoring of the detainees' correspondence, independently from any judiciary authority and not subject to any appeal, it was not sufficiently clear in indicating the scope of the discretion granted to the authorities and the manner in which it was to be exercised.

The Court recalled that the mechanism of individual petition under Article 34 could not only be hindered by direct coercion and intimidation, but also by indirect acts or contact which aimed to dissuade or discourage the applicant from using this right. The particular circumstances of the case had to be analysed, including the vulnerability of the applicant and the risk that he was influenced.

Concerning the refusal to forward the applicant's application file, containing essential documents under Court Rules, the Court held that even if states were not required to bear the costs of the detainees' correspondence, a problem could arise if this correspondence was seriously hampered by a lack of funds. The Latvian authorities had acted in breach of Article 34 by refusing repeatedly to send the applicant's application form to the Court.

As the applicant did not mention why the photocopied documents would have been necessary for his application, the Court did not consider that the refusal by the prison authorities to make copies at the State's expense and give them to the applicant could be regarded as "hindrance". It therefore held that there had been no violation of Article 34 on that point.

## Freedom of religion

### *Ivanova v. Bulgaria*

(52435/99)

**European Court of Human Rights:** Judgment of 12 April 2007

*Dismissal of a member of an unregistered religious organisation - Freedom of religion - Articles 9 and 14*

#### Facts

The applicant, Kalinka Todorova Ivanova, is a Bulgarian national who was born in 1950 and lives in Ruse, Bulgaria. She used to work in the River Shipbuilding and Navigation School in Ruse as a swimming pool manager. In addition, she was involved in the religious activities of "Word of Life", a Christian Evangelical group.

In February 1994 an Act was amended to require the registration of non-profit organisations which had religious activities. Among the organisations whose registration was turned down was Word of Life, which then began clandestine activities. Throughout 1994 and 1995, its meetings were periodically thwarted by the police, which further raided private homes where they confiscated religious materials.

The media then reported that several staff members of the school where the applicant worked were followers of Word of Life, and called for their dismissal; they named the applicant as one of those individuals. The Regional Prosecutor's Office and the National Security Service thereafter initiated inquiries into the religious activities of the school's staff members.

On 18 September 1995, the Regional Prosecutor's Office stated that the "unlawful" religious activities had been carried out with the tacit approval of its principal. Thereafter, the Regional Governor and a local member of parliament called for

radical measures to be taken. On 23 October 1995, the principal of the school was dismissed by the Ministry.

On 2 November 1995, the applicant was summoned to a meeting with the Educational Inspector and his deputy, together with another staff member. She alleged that the inspectors had threatened them that if they did not resign of their own accord or did not renounce their faith, they would be dismissed on disciplinary grounds. The applicant refused to resign and informed the new principal of the school about the meeting, but no action was taken.

Thereafter, the new principal alienated the applicant. Her office phone was removed; the locks to the swimming pool were changed. Enquiries were made as to her work performance. On 24 November 1995 the human resources department of the School prepared a list of employees allegedly without job descriptions. The applicant's name was among them.

In December 1995, by an amendment to the school's roster of posts further approved by the Ministry, the post of "swimming pool manager" was transformed into a post of "sports complex organiser", which required a university degree that the applicant did not have. By an order of 28 December 1995, the applicant was dismissed on the grounds of not meeting the education and professional qualification requirements for the post, in compliance with the Labour Code. She enquired as to which requirements she did not meet, but had no answer.

On 27 May 1996, the applicant initiated proceedings before the Ruse District Court challenging the lawfulness of the dismissal which, according to her, was directly related to her religious beliefs, in violation of the Labour Code and the Bulgarian Constitution prohibiting religious discrimination. She also complained that the changes to the school's roster of posts did not take place in accordance with standard practices, that is to say before the academic year, and that the changes were arbitrary. On 5 May 1997 the Ruse District Court found that the dismissal was lawful and dismissed the applicant's claims.

On 27 June 1997 the applicant appealed before the Ruse Regional Court, which dismissed her appeal. On 18 September 1997 the applicant appealed this decision, claiming that the lower courts had failed to properly evaluate the evidence before them and had never addressed the substance of her complaint alleging religious discrimination. In a final judgment of 9 December 1998 the Supreme Court of Cassation dismissed the applicant's appeal and upheld the findings of the lower courts.

### Complaints

The applicant complained that she had been dismissed from her job because of her religious beliefs, in violation of her right to freedom of religion. She relied on Article 9 of the Convention.

The applicant further complained under Article 14, in conjunction with Article 9, that her dismissal from the School had been inconsistent with the requirement of non-discrimination enshrined in the Convention.

### Held

The Court held that there had been a violation of Article 9 of the Convention.

The Court further held that there was no need to examine the complaint separately under Article 14 of the Convention.

The Court awarded the applicant EUR 589.23 for pecuniary damage, EUR 4,000 for non-pecuniary damage, and EUR 2,500 for costs and expenses.

### Commentary

The Court recalled that while religious freedom was primarily a matter of individual conscience, it also implied freedom to “manifest [one’s] religion”. It further recalled that Article 9 emphasised the fact that a State could not take coercive steps to make a person change his beliefs, even though it might be necessary to place restrictions on religious freedom in order to ensure that everyone’s beliefs were respected.

By assessing the facts in the case and considering the sequence of events in their entirety, the Court found evidence that the termination of the applicant’s employment was not simply the result of a justified amendment of the requirements for her post, but took place on account of her religious beliefs and affiliation with Word of Life. The fact that the applicant’s employment was terminated in accordance with the applicable labour law failed to eliminate the substantive motive for her dismissal.

The Court further considered that the state’s responsibility was engaged by the fact that the applicant was employed as a non-academic staff member at the school, which was under the direct supervision of the Ministry. Moreover, it noted the activities in breaking up gatherings of Word of Life, the involvement of other authorities and officials and the resulting disciplinary dismissal of the

former principal. The dismissal of the applicant soon after the appointment of the new principal appeared to have resulted directly from that policy. As a result, it found a violation of Article 9.

## Freedom of expression

### *Karman v. Russia*

(29372/02)

**European Court of Human Rights:** Judgment of 14 December 2006

*Conviction of a journalist for defamation - Right to freedom of expression – Right to a fair hearing – Article 6(1) and Article 10*

#### Facts

The applicant, Anatoliy Vladimirovich Karman, is a Russian national who was born in 1957 and lives in Volgograd, Russia. He is director-general and editor-in-chief, of *Gorodskiy Vesti* newspaper.

On 2 September 1994, he published an article in the newspaper which criticised the alleged anti-Semitic attitude of Mr. Terentyev, the director of the newspaper *Kolokol*, calling him a “local neofascist”.

On 24 September 1994, Mr. Terentyev lodged a civil defamation action against the applicant and his newspaper before the Sovetskiy District Court of Volgograd. The Court granted the action and required that the applicant pay non-pecuniary damages. The applicant lodged an appeal, which was supported by the district prosecutor who submitted that the Volgograd regional prosecutor had opened a criminal investigation into the incitement of ethnic hatred by the *Kolokol* newspaper. The decision was quashed by the Volgograd Regional Court, which remitted the matter for new examination with the exigency of commissioning an expert study of the incriminated publication and examining the materials of the criminal investigation.

On 22 August 1996, the applicant requested before the District Court that issues of *Kolokol* newspaper be examined in a composite expert study, and that the proceedings of the criminal case be adjourned pending investigation. This request was dismissed, as the Court estimated that the available expert reports carried out in the criminal proceedings against the *Kolokol* newspaper were

sufficient. The Court pronounced judgment in favour of Mr. Terentyev and awarded him damages against the applicant.

The judgment was quashed and the case was remitted for new examination on 24 April 1997 by the Presidium of Volgograd Regional Court, as the District Court had not remedied the identified defects. On 8 November 1999 the Volgograd regional prosecutor's office discontinued the criminal proceedings against Mr Terentyev. It stated that *Kolokol*, though making negative statements on "the world Jewish masonry", did not contain incitement to extermination of Jewish people, humiliation of national dignity, or violent overthrow of the existing government. It further stated that Mr Terentyev was not aiming to incite ethnic or racial hatred, and his actions lacked the constitutive elements of a criminal offence.

On 10 August 2001, the District Court of Volgograd discontinued the criminal case and awarded damages to Mr Terentyev, on the grounds that the applicant had failed to show the truthfulness of the term "neofascist", as Mr Terentyev was not a member of a political party advocating fascist principles. The District Court did not refer to the opinions of other experts, notably a 1995 expert report establishing that the *Kolokol* newspaper generally reflected the National-Socialist perception of the global Jewish conspiracy and the need to clean the Russian ethnic community of its influence.

The applicant appealed, submitting that the expert studies had only concerned the charge of incitement to ethnic and racial hatred, without addressing the notion of "neofascism". The constituent elements of the criminal offence had been substantially different from the scope of the defamation claim. On 28 November 2001 the Volgograd Regional Court upheld the judgment but reduced the awards, which were recovered on 25 January 2002.

### Complaints

The applicant complained under Article 10 that his right to freedom of expression had been infringed.

Relying on Article 6(1), he further alleged that his right to a fair hearing had been violated.

### Held

The Court held that there had been a violation of Article 10, as the interference of the domestic courts in the applicant's right to freedom of expression was not

justified.

The Court further considered that there was no need for a separate examination of the complaint under Article 6(1).

The Court awarded the applicant EUR 1,000 by way of non-pecuniary damages.

#### Commentary

The Court upheld the applicant's interpretation of the term "neo-fascist", with regards to Mr Terentyev's publications. It held that the definition of the term by the Russian courts, as designating members of a neo-fascist party, was too narrow, as it should be understood as a value-judgment describing a general political affiliation.

The Court further reiterated that it had constantly held that the truth of value judgments, unlike the existence of facts, was not susceptible to proof. A value judgment based on no factual basis could nevertheless be excessive, but in the present case, the applicant's comment was acceptable as he offered documentary evidence that the publications were anti-Semitic and promoted ideals similar to those of National Socialism.

The Court added that it was "struck" by the approach of the Russian courts, which refused to examine the available evidence while requiring proof of a statement.

The Court noticed that the standards for establishing the truthfulness of a criminal charge did not have to be as precise for a journalist expressing his views on someone's political opinions in terms of morality, as for a competent court establishing an offence under criminal law.

The Court further recalled that the role of the press was to impart information and ideas on matters of public concern, even though they might offend, shock or disturb. Subsequently, describing Mr Terentyev as a "local neofascist" did not exceed the acceptable limits of criticism. The Court therefore concluded that the standards applied by the domestic courts did not adduce sufficient reasons justifying any interference in the right to freedom of expression, infringing Article 10 of the Convention.

## Freedom of assembly and association

### *Linkov v. Czech Republic*

(10504/03)

**European Court of Human Rights:** Judgment of 7 December 2006

*Refusal of registration of a political party – Right to freedom of association - Articles 6(1), 10, 11 and 13 of the Convention, and Article 3 of Protocol No. 1*

#### Facts

The applicant, Vaclav Linkov, is a Czech national who was born in 1979 and lives in Brno, Czech Republic. He is a member of the preparatory committee of the political party *Liberální Strana*, and brings suit on its behalf.

On 21 July 2000, a preparatory committee of the political party *Liberální Strana* submitted a registration request to the Ministry of the Interior. The request was accompanied by a list of party aims and political positions articulated in Chapter 2 of the party goals.

On 9 August 2001, the Ministry of the Interior rejected the request, on the ground that the listed goals were illegal and unconstitutional. The Ministry stated that the goal of “annulling penal provisions that blame citizens for their convictions and for the exercise of their freedom of speech” infringed the spirit of freedom of expression and right to information. Some provisions of the Criminal Code indeed prohibited approval of Nazi and communist crimes in order to prevent threats to democracy. Moreover, the goal of “breaking the legal continuity with totalitarian regimes” was incompatible with the Constitution and could threaten the integrity of the state. In addition, the voting procedure on the merger or dissolution of the party was not democratic.

The preparatory committee appealed this decision. Its members maintained that the goal of annulling certain penal provisions was to change public policy with regard to extremists. It further alleged that breaking the legal continuity with totalitarian regimes was necessary in order to punish crimes of communism, for it would allow the adoption of laws repressing deeds that were not criminal under the communist legal system, but that violated the international treaties of which the former Republic was a party. Because the purpose of this change was merely to achieve a settlement with the Czech Republic’s Communist past by democratic methods, there should be no threat to the Republic’s integrity.

The judgment was upheld on 2 April 2002 by the Supreme Court, which confirmed that the goal of breaking the legal continuity with totalitarian regimes would threaten the democratic foundations of the state. On 30 May 2002, the applicant and another member of the preparatory committee lodged an appeal before the Constitutional Court, where they complained about the violation of their freedom of association and rights to stand for elections and to vote, and further relied on Article 7(2) of the Convention.

On 6 November 2002, the Constitutional Court declared the appeal manifestly ill-founded, as the contentious decisions did not infringe the applicants' constitutional rights. It stated in particular that the issue about Article 7(2) of the Convention had been raised for the first time and it did not consider itself competent to judge this issue, as it had not been examined by the inferior courts.

#### Complaints

The applicant complained that the authorities' refusal to register *Liberální Strana* as a political party had infringed his right to freedom of association. He relied on Article 10 and Article 11.

Relying on Articles 6(1) and 13, he added that his rights to a fair trial and to an effective remedy had been violated, since the Constitutional Court had rejected his appeal without having taken into account his claim under Article 7(2) of the Convention.

He further argued, under Article 3 of Protocol No. 1, that he subsequently had been unable to stand for election on behalf of the party or to vote for its candidates.

#### Held

The Court held that there had been a violation of Article 11.

The Court considered that it was not necessary to examine separately the complaints under Articles 6, 10 and 13 of the Convention and under Article 3 of Protocol no 1.

The Court held that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant.

The Court awarded the applicant EUR 150 for pecuniary damage and EUR 700 for costs and expenses.

### Commentary

The Court stated that the refusal to register *Liberální Strana* as a political party interfered with the applicant's right to freedom of association. It further noted that the main dispute was on whether this interference, which was prescribed by the law and pursued a legitimate aim, was necessary in a democratic society. The Court then examined whether this interference could be regarded as having met a "pressing social need".

The Government alleged that "breaking the legal continuity with totalitarian regimes" was violating the principle of non-retroactivity of criminal law. The applicant however argued that in the present case, such a change was authorised by Article 7(2) of the Convention, aimed at punishing the past crimes against humanity, and did not threaten democratic principles.

The Court considered it necessary to take into account the historical and political background to the case. It observed that, since the change of regime in 1989, the Czech Parliament had passed two laws declaring that the Communist regime had consistently and systematically breached human rights and the fundamental principles of a democratic state. Moreover, domestic legislation did not provide for a limitation period for offences that had remained unpunished for political reasons between 25 February 1948 and 29 December 1989. Taking into account the age of the perpetrators, it amounted to excluding the application of the statute of limitations to such offences, which was the aim pursued by the applicant.

The Court further stated that there was no evidence that *Liberální Strana* had not sought to pursue its aims by lawful means, or that its proposition had been incompatible with fundamental democratic principles, in particular as the party's registration had been refused before it had been able to carry out any activities.

The Court reminded that the refusal to register a party was a radical measure that could only be justified in the most serious cases. However, *Liberální Strana* had not advocated anything that could have undermined the democratic foundations of the country and had not urged or sought to justify the use of force for political ends.

The Court concluded that the refusal to register seemed disproportionate, and was not necessary in a democratic society. There had thus been a violation of Article 11.

### ***Ramazanova and Others v. Azerbaijan***

(44363/02)

**European Court of Human Rights:** Judgment of 1 February 2007

*Major delays in the State registration of an association – Right to freedom of association- Articles 6(1), 11 and 13*

#### Facts

The applicants, Nabat Ramazanova, Emin Zeynalov, Zarifa Ganbarova and Eldar Alizadeh, are Azerbaijani nationals who were born in 1947, 1949, 1952 and 1947 respectively and live in Baku, Azerbaijan.

On 4 April 2001 the applicants founded a public non-profit association aimed at providing aid and protection to the homeless, named “Assistance to the Human Rights Protection of the Homeless and Vulnerable Residents of Baku”.

On 9 April, they requested the state registration of the association within the Ministry of Justice, in order to acquire the status of a legal entity. According to the Government, the request was filed on 12 April. On 18 May 2001, the Ministry returned the registration documents, accompanied by a letter explaining that the association’s charter had to include a provision on the territorial area of its activity, in order to comply with the law. The applicants subsequently drafted a new version of the charter and, on 4 June 2001, submitted a second registration request. They were answered, on 10 September 2001, that the charter still did not comply with the law, as it failed to provide for the terms of office of the association’s supervisory board. The applicant consequently modified the charter, and, on 2 October 2001, filled a third registration request. They did not receive any answer.

The applicants thereafter applied to the Yasamal District Court on 22 May 2002, asking for the registration of the association and for a moral compensation. On 5 July 2002, the Ministry wrote a letter to the court, declining the registration again for the reason that the applicants had failed to mention in the charter the conditions for membership in the association. On 15 July 2002, the Yasamal

District Court dismissed the claim, as the association's charter did comply with the domestic law. The judgment was upheld by the Court of Appeal on 19 September 2002, then by the Supreme Court on 20 November 2002.

Meanwhile, on 29 July 2002, the applicants submitted their fourth registration request, having drafted a new charter. They did not receive any reply within the statutory five-day period. They then launched new proceedings before the Yasamal District Court, arguing that the Ministry illegally delayed the examination of their registration request. On 5 September 2002, the Yasamal District Court declared the complaint inadmissible, as their request was still pending examination and that extrajudicial resolution had not been exhausted. The decision was upheld by the Court of Appeal on 1 November 2002, and by the Supreme Court on 13 January 2003.

In the meantime, the applicants lodged another complaint, asking the Yasamal Court to provide legal interpretation of the right of the Ministry to repeatedly delay registration under the domestic law, and to forward the question of the constitutionality of this affair to the Constitutional Court. This claim was not admitted by the Court, which noted on 18 December 2002 that the petition to forward the case to the Constitutional Court had to be made before the Supreme Court. This decision was upheld by the Supreme Court on 26 September 2003.

The Ministry refused the fourth registration in a letter of January 2003. The applicants subsequently submitted a fifth registration request. They also filed a new lawsuit against the latter refusal, which was rejected by the Yasamal District Court on 26 February 2003, as the applicants still had some cases pending before the higher courts. The Supreme Court upheld this decision on 3 September 2003. The applicants' additional cassation appeal with the President of the Supreme Court, requesting the reopening of the proceedings and referral of the case to the Plenum of the Supreme Court, was rejected on 10 November 2003.

The applicants subsequently lodged a complaint before the Constitutional Court, which was accepted for examination on 23 February 2004. The Constitutional Court held, on 11 May 2004, that the domestic courts had infringed the judicial guarantees for protection of human rights and freedoms, as guaranteed by the Constitution. It cancelled the domestic judgments and remitted the case to the courts for a new examination.

On 18 February 2005, the Ministry of Justice accepted the fifth request and registered the association. The same day, the Yasamal District Court dismissed the

applicant's claim, as the contentious matter had been solved by the registration of the association. No compensation was awarded despite the applicant's claim. The judgment was upheld on 22 July by the Court of Appeal, then on 22 December by the Supreme Court.

The applicants subsequently lodged a new complaint, arguing that the Ministry of Justice had breached domestic law. The claim was rejected on 14 September 2006 by the Yasamal District Court. On 8 December 2006, the Court of Appeal found that the repeated delays by the relevant official of the Ministry of Justice in responding to the applicants' registration requests had constituted a breach of requirements of the relevant domestic law and awarded three of the four applicants compensation for non-pecuniary damage.

#### Complaints

The applicants alleged that the major delays in the state registration of their association had violated their right to freedom of association. They relied on Article 11.

They further argued under Article 6(1) that the domestic courts had failed to comply with their obligation of independence and impartiality.

They finally complained that the domestic remedies had not been effective, relying on Article 13.

#### Held

The Court held that there had been a violation of Article 11.

The Court further held that the applicants' complaints under Articles 6(1) and Article 13 were manifestly ill-founded, and subsequently rejected them.

The Court awarded the applicants EUR 4,000 for non-pecuniary damage and EUR 2,000 for costs and expenses.

#### Commentary

The Government challenged the admissibility of the claim. The Court stated that the compatibility *ratione temporis* was partially disputable. The European Convention on Human Rights entered into force with respect to Azerbaijan on 15 April 2002; and therefore the Court's competence was limited to that part

of the complaint relating to the events that occurred after this date. The Court added that it could nonetheless take into account the state of affairs as they had existed at the beginning of the case.

The Government also claimed that the applicants had lost their victim status when registering their association, as they had been compensated. The Court however held that even if the authorities had acknowledged the violation of the applicant's right, the award of the moral compensation had been partial and insufficient considering the prejudice to which they were subjected. The eventual but significantly delayed state registration of the association was not sufficient to deprive them of their victim status.

The Government alleged that the applicant had not exhausted domestic remedies as it had not they had not filed an additional cassation complaint with the Plenum of the Supreme Court. The Court rejected this argument, recalling that it had previously found in an earlier case that the additional cassation procedure in the Plenum of the Supreme Court of the Republic of Azerbaijan did not constitute an effective remedy.

The Court noted that the decision on the registration had been evaded by delaying it constantly for years, which had to be interpreted as a *de facto* refusal. The Court added that the absence of legal status prohibited the association from receiving any grants or financial donations, and therefore from carrying out proper activities. Domestic law was not precise, either on the consequences of the Ministry's failure to take action within the statutory time-limits, nor on the allowed number of returns of registration requests "with no action taken". It did not provide automatic registration in case of such a failure, which could justify an arbitrary prolongation of the registration process. The law therefore did not afford the applicants sufficient legal protection.

As the Ministry had breached the statutory time-limits for the association's state registration, and as the domestic law did not provide sufficient protection against its arbitrary actions, the Court held that the interference in the applicant's right to freedom of association had not been prescribed by law, in violation of Article 11(2) of the Convention.

## ***Mkrtchyan v. Armenia***

(6562/03)

**European Court of Human Rights:** Judgment of 11 January 2007

*Arrest for having organised an unlawful procession - Freedom of assembly - Article 11 of the Convention*

### Facts

The applicant, Armen Mkrtchyan, is an Armenian national who was born in 1972 and lives in Yerevan, Armenia.

On 14 May 2002, the “Republic” Party, of which the applicant was a member at the material time, held a demonstration, together with six other political parties. The demonstration had been authorised by the Mayor of Yerevan, on the main square of the city (Freedom Square). An hour after the beginning of the demonstration, the applicant initiated a procession towards the Parliament building.

Later on that day, the applicant was arrested and brought to the Arabkir District Police Station for having “organised an unlawful procession”. On 15 May 2002, the Kentron and North-Marash District Court of Yerevan alleged that the applicant had violated the prescribed rules for holding demonstrations and street processions and imposed a fine, under Article 180.1 of the Code of Administrative Offences.

On 24 May 2002, the applicant appealed to the Civil Court of Appeal, even though the decision was final and not subject to appeal, arguing that he had a constitutional right to contest this decision before a higher Court. He further argued that his right to freedom of assembly had been violated, as domestic legislation did not prescribe the rules that he was alleged to have infringed. Moreover, he requested the Court of Appeal to name any such law.

On 14 June 2002, the Civil Court of Appeal affirmed that the demonstration which had been held on the Freedom Square of Yerevan was authorised, whereas the following procession was illegal, and confirmed the District Court’s decision. On 24 June 2002, the applicant appealed to the Court of Cassation. The Court, in a letter of 1 July 2002, responded saying that he was not allowed under domestic law to lodge a cassation appeal against the contentious decision.

On 28 April 2004, the Armenian Parliament adopted a law on the procedure for holding assemblies, rallies, street processions and demonstrations.

#### Complaints

The applicant claimed that the sanction illegally interfered with his right to freedom of peaceful assembly, as the article under which he was subjected to a fine referred to “rules” that had not been prescribed by any law. He relied on Article 11, the right to freedom of assembly and association.

#### Held

The Court held that there had been a violation of Article 11 of the Convention, as the interference with the exercise of the freedom of peaceful assembly was not justified.

The Court held that the finding of the violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant; no award for just satisfaction was made.

#### Commentary

This is the first judgment of the ECtHR against Armenia.

The Court considered that the Government’s interference with the applicant’s right to freedom of assembly, in the present case had a legal basis in domestic legislation, as Article 180.1 of the Code of Administrative Offences, under which the fine was prescribed, was accessible. The Court further recalled that, for the interference to be justified, the law had to fulfil the requirements of accessibility, precision, and foreseeability.

The Court noted that there was an argument between the parties on whether there was, in the present case, a prescription by the domestic law. The Government and the applicant had divergent interpretations of the validity of the former Soviet legal acts in the current legislation of the Republic of Armenia.

Article 180-1 of the Code of Administrative Offences only mentions “the rules for organising and holding demonstrations and street processions”, without specifying them. According to the Government, such rules were prescribed by a Decree on “Rules for Organising and Holding of Assemblies, Rallies, Street Processions and demonstrations in the USSR” of 28 July 1988. This decree

had itself been approved by the Soviet law on “Approving Decrees on the Chairmanship of the Supreme Soviet of the USSR on Making Amendments and Supplements to Certain USSR Legal Acts” of 28 October 1988.

The main issue was therefore to determine whether a Soviet legal act continued to be valid at the material time, as Armenia has since become independent.

The Government alleged that these legal acts remained valid according to Article 16 of the Constitutional law on the Foundations of Independent Statehood of 25 September 1991, which included the laws of the former USSR as “valid Constitution and laws”. The latter remained valid after the adoption of the Constitution of 5 July 1995, under its Article 116(2), as they already were included in the “laws and other legal acts of the Republic of Armenia”.

The applicant argued that Article 11 of the CIS Convention of 8 December 1991, which was signed and ratified by Armenia on 8 December 1991 and 18 February 1991 respectively, ended the applicability of Soviet laws within the territory of the member states. He further held that the typically Soviet terminology of the Decree corroborated this interpretation.

The Government however alleged that the Law and the Decree did not fall under Article 11 of the CIS Convention, as they had already been incorporated into national legislation. It argued that only the legal acts which were adopted between 25 September 1991, when the Constitutional Law of Armenia integrating Soviet legal acts into Armenian legislation was issued, and the dissolution of the USSR in December 1991, were concerned by this Article.

Furthermore, the Government argued that the Republic of Armenia had to incorporate the legal acts of the former USSR on independence, in order to avoid any legal crisis in the absence of a new legal system. The Government therefore submitted, presenting some examples, that many laws adopted during the Soviet period continued to be valid in the Republic of Armenia, unless a decision on their termination was adopted. Now that a new law on holding demonstrations had been adopted on 28 April 2004, the contentious decree was no longer valid. However it remained valid before this date, as it was part of the legislation of the former USSR. As such it applied to the former ASSR and to its successor, the Republic of Armenia.

The applicant stated in response that the Republic of Armenia succeeded the former ASSR and not former USSR, and that the only laws of the former ASSR (and not USSR) were concerned by the Declaration of Independence.

The Court held that both interpretations were justifiable, as there was no clear statement of whether the former USSR laws remained applicable in the independent Republic of Armenia, as the legal acts of the former ASSR.

Nevertheless, in the absence of any domestic case-law concerning the contentious issue, and considering the domestic courts' lack of reference to any legal act which prescribed the rules the applicant was alleged to have infringed, the Court found that the law, with regard to the "prescribed rules" of Art. 180.1 CAO, was neither precise nor foreseeable.

The Court also noted that a legal act concerning the key issue of freedom of peaceful assembly had been adopted on 28 April 2004, whereas Armenia had gained independence almost thirteen years previously, and that this delay was not acceptable.

The Court therefore held that the interference with the applicant's right to freedom of peaceful assembly was not justified, as it was not prescribed by the law, and that therefore, the two other arguments did not need to be examined.

## Right to an effective remedy

### *Aksakal v. Turkey*

(37850/97)

**European Court of Human Rights:** Judgment of 15 February 2007

*Village destruction - Right to an effective remedy – Articles 3, 6 (1), 8, 13, 14, 18 and Article 1 of Protocol No. 1*

#### Facts

The applicant, Halis Aksakal, is a Turkish national who was born in 1963. Mr Aksakal lives in Diyarbakır, Turkey.

At the time of the events, the applicant lived in Görbeyli village in the province of Diyarbakır situated in a region of Turkey which was then under a state-of-

emergency. According to his version of events, on 5 May 1995, after an explosion in a nearby military camp, a group of reinforcement soldiers from Lice rounded up the inhabitants of the applicant's village and split them into two groups, one of women and children and the other of the men. The soldiers then beat the men of the village using clubs. At the same time, another group of soldiers entered the village and started destroying the villagers' possessions or taking the goods which might be of use to them. On 12 May 1995 and in the second half of June 1995, the soldiers raided the village again, and beat the villagers as before. They demolished the houses, killed many of the livestock in the village and finally razed it to the ground.

On June 1995, the applicant and two members of the village elders' council filed complaints with the offices of the State of Emergency Regional Governor, the Diyarbakır Chief Public prosecutor and the Diyarbakır Provincial Regiment Command. The applicant's fellow villagers' request to return to and cultivate their lands was rejected by the authorities. They asked the judicial authorities to conduct an investigation into the events and to prosecute those responsible for the destruction of their property.

The investigation was carried out by a gendarme officer in July 1996. He mainly took statements from five witnesses, who were all inhabitants of Görbeyli, and concluded that the applicant's allegations were unfounded. Relying on the conclusion of the gendarme captain, the Administrative Council decided that no proceedings should be brought against the security forces and village guards. In November 1995, the applicant made an application to the European Court of Human Rights which was confronted with a dispute over the exact cause of the events giving rise to the present case.

The applicant submitted a report prepared by a local human rights organisation that gives the list of villages or settlements which were allegedly evacuated or destroyed by the security forces. The applicant's village appears on this list as having been burned down on 15 May 1995. The applicant also furnished the Court with photocopies of four photographs showing four houses in ruins allegedly in Görbeyli.

### Complaints

The applicant complained under Article 1 of Protocol No. 1 that his forced eviction from his family home and deliberate destruction of his property by the State security forces constituted a violation of his right to peaceful enjoyment of his possessions.

The applicant further argued that the fact that he had to leave his place of residence with no possibility of return had amounted to a violation of his right to respect for his family life under Article 8.

The applicant claimed that the circumstances surrounding the destruction of his property and his eviction from his village also amounted to inhuman and degrading treatment, in violation of Article 3.

The applicant submitted that his right of access to a court to assert his civil rights under Article 6(1) of the Convention had been denied on account of the failure of the authorities to conduct an effective investigation into his allegations. In his opinion, without such an investigation, he would have had no chance of obtaining compensation in civil proceedings.

The applicant complained under Article 13 of the Convention that he had no effective remedy available in respect of his grievances under the Convention.

The applicant further maintained that, as a result of his Kurdish origin and as the destruction of his house and possessions were part of an official policy, he had been subjected to discrimination in breach of Article 14 of the Convention, in conjunction with Articles 6, 8 and 13 of the Convention and Article 1 of Protocol No. 1.

The applicant invoked Article 18 of the Convention, claiming that the interference or restrictions complained of were imposed for purposes incompatible with the Convention.

#### Held

The Court held unanimously that there had been no violation of Articles 3, 8 and 14 and Article 1 of Protocol No. 1, ruling that the applicant's evidence did not sufficiently prove the respondent Government's responsibility for the destruction of his village.

The Court also held unanimously that there was no violation of Article 18 and that it was not necessary to determine whether there had been a violation of Article 6(1).

The Court did however find a violation of Article 13. It ruled that there were serious defects in the investigation conducted by the authorities following complaints by the applicant subsequent to the destruction of his house in

Görbeyli.

The Court awarded the applicant EUR 4,000 in respect of non-pecuniary damage and EUR 3,000 for costs and expenses.

Commentary

The Court did not find it established to the required standard of proof that the applicant's house was burned down, or that he was forcibly evicted from his village and prevented from returning there by the State security forces. It recalled that the relevant standard of proof was 'beyond reasonable doubt'. In this context, the Court found that the applicant had failed to corroborate his allegations. It noted that he did not submit any independent eye-witness statement in relation to the burning down of his house and possessions by the security forces. Nor did he give any particulars as to the identity of the soldiers involved in the alleged events or when and how he was prevented by the authorities from returning to his village. Furthermore, the Court stated that the applicant had not intervened in the proceedings which were commenced by the Lice Public Prosecutor's office, nor had he pursued his case subsequent to the lodging of a complaint with the prosecuting authorities. In the Court's opinion the applicant had offered no explanation for his failure to follow up the investigation conducted by the authorities. Moreover, the Court also found no evidence in the file which would rebut the Government's submissions and the findings of the national authorities, in particular, the testimonies obtained from the applicant's fellow villagers.

ECtHR case history points to a systematic campaign of village destruction in the 1980s and 1990s by the Turkish Government within the Kurdish regions of Turkey. This judgment was passed despite acknowledgement by the Court that it has in the past 'found in numerous similar cases that security forces deliberately destroyed the homes and property of certain applicants'. Despite the established case history of state involvement in village destruction, the Court chose to place the greater burden of evidence on the victim. The Court regretted being unable to attempt to establish the facts of the present case by embarking on a fact finding exercise of its own. However, it considered that such an exercise would not yield sufficient evidence capable of establishing the true circumstances of the case, given the passage of a substantial period of time, almost eleven years in the instant case.

In the Court's view, the applicant's complaints mainly pertained to the lack of an effective investigation into the deliberate destruction of his family home and possessions by the security forces. It therefore examined this complaint from the

standpoint of Article 13, which imposes a more general obligation on States to provide an effective remedy in respect of alleged violations of the Convention. The Court criticised the fact that the investigating authorities did not consider visiting the scene of the incident in order to verify whether the applicant's house or any other house in Görbeyli was indeed burned down. The gendarme officer in charge of the investigation did not attempt to take statements from members of the security forces who conducted operations in and around Görbeyli village subsequent to the clashes on 15 May 1995. They were rather content to rely on the information given by the Gendarmerie authorities that no houses were burned down in Görbeyli. Further, the Court recalled that investigations carried out by local administrative councils could not be regarded as independent since they were composed of civil servants, who were hierarchically dependent on the governor, and an executive officer was linked to the security forces under investigation. The Court therefore found a violation of Article 13.

Since delivery of the judgment, a request has been made to refer this decision to the Grand Chamber.

## Protection of property

### *Fener Rum Erkek Lisesi Vakfı v. Turkey*

(34478/97)

**European Court of Human Rights:** Judgment of 9 January 2007

*Cancellation of a foundation's property titles - Right to protection of property - Prohibition of discrimination - Article 1 of the Protocol No 1 and Article 14*

#### Facts

The applicant, Fener Rum Erkek Lisesi Vakfı, is a foundation under Turkish law, providing education in a Greek Higher Secondary School located in Fener, Istanbul, Turkey. It was created under the Ottoman Empire.

The applicant's status was ruled under the Turkish Republic by the law no 2762 of 13 June 1935 on foundations created before the promulgation of the civil code (1926), by virtue of which it obtained legal personality. In 1936, the applicant declared its immovable properties and entered them in the real estate register, in accordance with Article 44 of the same law.

On 10 October 1952, the applicant acquired by donation a part of a building

located in Istanbul. On 16 December 1958, the applicant purchased another part of the same building. After each acquisition, the prefect of Istanbul delivered an attestation, on 3 October 1952 and 15 November 1958 respectively, stating that the applicant was authorised to acquire immovable properties, according to the law on foundations. The properties were entered in the real estate register. The applicant paid all the taxes and rates relating to the properties.

On 15 July 1992, the Treasury initiated proceedings before the High Court of Beyoğlu, in Istanbul, in order to cancel the applicant's property titles and to register its estates under the names of their former owners. On 19 December 1994, an expert mandated by the Court established a report stating that the applicant was precluded from acquiring immovable property. He referred to a Court of Cassation case of 8 May 1974, alleging that foundations made up of religious minorities as defined in the treaty of Lausanne, could not acquire immovable property after 1936, unless an explicit clause enabling them to purchase real estate had been inserted within their 1936 declaration. The 1974 decision was based on the fact that the acquisition of immovable property by legal entities consisting of non-Turkish people threatened national security.

On 7 March 1997, the Court granted the Treasury's application by stating that the applicant's property titles had no legal basis. The Court further ordered their cancellation and their registration under the names of the former owners.

On 17 April 1996, the applicant applied to the Court of Cassation, complaining that Article 1 of the Protocol No 1 of the ECHR, guaranteeing the right to protection of property, had been infringed. The appeal was rejected on 11 June 1996. On 9 December 1996, the Court of Cassation rejected another appeal by the applicant. On 16 October 2000, the applicant applied to the general Direction of Foundations in order to modify its status, to enable it to purchase real estate. This demand was rejected on 20 October 2000, on the basis of the 8 May 1974 case-law.

A 2002 law modified the legislation concerning the estates of the foundations, allowing them to purchase immovable properties, according to their needs, with the authorisation of the Ministers' Council. It also permitted them to ask for the registration of their current estates in the real estate register, in the 6 months following the coming into effect of the law. Furthermore, a 2003 law allowed the foundations to acquire immovable goods, even in the absence of any founding status.

### Complaints

The applicant alleged that the Government had infringed Article 1 of Protocol No 1 of the Convention by having cancelled its property titles without any legal basis.

The applicant further argued that Article 14 of the Convention, prohibition of discrimination, had been infringed, together with Article 1 of Protocol No. 1.

### Held

The Court held that there had been a violation of Article 1 of Protocol No 1, as the Turkish courts had interfered in the applicant's right to the peaceful enjoyment of its possessions.

The Court further considered that it was not necessary to examine separately the complaint under Article 14.

The Court ordered the respondent Government to proceed to the re-registration of the estates in question in the real estate register, within three months of the day when the judgment becomes definitive, according to Article 44(2) of the Convention. Failing that re-registration, the State was ordered to pay EUR 890,000 for pecuniary damage to the applicant.

The Court awarded the applicant EUR 20,000 for costs and expenses.

### Commentary

The Government raised an inadmissibility argument, stating that domestic remedies had not been exhausted, as the 2002 and 2003 laws could have allowed the applicant to appeal against the new owners in order to get its property titles back. The Court refused to hear this argument, as the inadmissibility arguments have to be raised during the admissibility stage.

Regarding the alleged violation of Article 1 of Protocol No 1, the Court first noted that the setting aside of the applicant's property titles had interfered in its right to peaceful enjoyment of possessions. The Court then stated that it did not matter whether the legal basis was a precedent or a legislative act, even in a continental law system such as the Government's one; what had to be highlighted was whether the legal basis responded to the principle of legality, which requires accessibility, precision and foreseeability.

The Court further recalled that no provision in Law no. 2762 prohibited

foundations to purchase real estate after 1936. Furthermore, the authorities validated the applicant's acquisitions by issuing certificates, and by registering them in the real estate register. The applicant also paid all taxes and incomes attached to the contentious properties. The applicant could therefore be sure of having acquired the properties lawfully. Moreover, it enjoyed peacefully its estates for respectively 38 and 44 years, until 17 April 1996. Consequently, the cancellation of its property titles and their removal from the land registers, in accordance with a later precedent, could not have been foreseen by the applicant.

The Court further noted the modification of the Turkish legislation on foundations (2002 and 2003), but also stated that it had not benefited the applicant. Subsequently, the Court concluded that the contentious interference of the Government was not compatible with the principle of legality, and that it had therefore infringed the applicant's right to protection of property under Article 1 of Protocol No 1.

***Xenides-Arestis v. Turkey*** (just satisfaction only)  
(46347/99)

**European Court of Human Rights:** Judgment (just satisfaction only) of 7 December 2006

*Right to respect for private and family life and home- Prohibition of discrimination – Right to peaceful enjoyment of property – Articles 8, 14 and Article 1 of Protocol No 1*

Facts

The applicant, Mrs Myra Xenides-Arestis, is a Cypriot national of Greek-Cypriot origin, who was born in 1945 and lives in Nicosia, Cyprus.

She owns half a share in a plot of land in the area of Ayios Memnon, in Famagusta (Northern Cyprus), where she lived with her husband and children. She has been prevented from living in her home or using her property since August 1974, as a result of the division of the island.

The applicant had complained before the European Court of Human Rights of a continuing violation of her rights under Article 8 of the Convention (right to respect for her home) and Article 1 of Protocol No. 1 to the Convention (protection

of property). She also maintained that Turkish military forces prevent her from having access to and from using and enjoying her home and property because she is Greek Orthodox and of Greek-Cypriot origin, in violation of Article 14 of the Convention (prohibition of discrimination).

In a judgment of 22 December 2005, the Court held that there had had been a continuing violation of Article 8 of the Convention, since the applicant had been unable to gain access to, to use and enjoy her home since 1974. The Court also held that there had been a continuing violation of Article 1 of Protocol No. 1 to the Convention since the applicant, who had still to be regarded as the legal owner of her land, was denied access to, control, use and enjoyment of her property and any compensation for the interference with her property rights. The Court further found that it was not necessary to examine the applicant's complaint under Article 14. The judgment is summarised in KHRP Legal Review (2006)9 at pages 148-150.

The Court found that this violation is committed as a matter of policy or practice in the Turkish Republic of Northern Cyprus (TRNC). There were at the time approximately 1,400 property cases pending before the Court brought primarily by Greek-Cypriots against Turkey. The Court further considered that Turkey should introduce, within three months, a remedy which secured, in respect of the Convention violations identified in the judgment, genuinely effective redress for the applicant as well as in relation to all similar applications pending before the Court, in accordance with the principles for the protection of the rights laid down in Article 8 and Article 1 of Protocol No. 1. The Court stated that redress should occur three months thereafter. Pending the implementation of general measures, the Court adjourned its consideration of all similar applications.

The Court further held unanimously that, as far as any pecuniary or non-pecuniary damage was concerned, the question of the application of Article 41 (just satisfaction) was not ready for decision and awarded the applicant EUR 65,000 for costs and expenses.

Subsequent to the adoption of the principal judgment, the authorities of the Turkish Republic of Northern Cyprus enacted the new compensation law, the "Law for the Compensation, Exchange and Restitution of Immovable Properties" ("Law no. 67/2005") which entered into force on 22 December 2005 and the "By-Law made under Sections 8 (2) (A) and 22 of the Law for the Compensation, Exchange and Restitution of Immovable Properties which are within the scope of sub-paragraph (b) of paragraph 1 of Article 159 of the Constitution" which

entered into force on 20 March 2006.

An Immovable Property Commission was established under “Law no. 67/2005” for the purpose of examining applications made in respect of properties within the scope of the law. This is composed of five to seven members, two of whom are foreign members, and has the competence to decide on the restitution, exchange of properties or payment of compensation. A right of appeal to the TRNC High Administrative Court applies.

The Government submitted that a total of sixty applications had been lodged with the Commission and that the examination of nine of these had already been concluded. In six of these applications the applicants received a payment by way of compensation and, in the remaining applications, the Commission decided on the restitution of the properties in question.

#### Held

Under Article 41, the Court awarded the applicant EUR 800,000 for pecuniary damage, EUR 50,000 for non-pecuniary damage, and EUR 35,000 for costs and expenses.

#### Commentary

The Court welcomed the steps taken by the Government in an effort to provide redress for the violations of the applicant’s Convention rights as well in respect of all similar applications pending before it. The Court noted that the new compensation and restitution mechanism, in principle, had taken care of the requirements of the decision of the Court on admissibility of 14 March 2005 and the judgment on the merits of 22 December 2005.

However, the Court could not accept the Government’s argument that the applicant should now be required at this stage of the proceedings to apply to the new Commission in order to seek reparation for her damages, given that the Court had already decided on the merits. The Court therefore proceeded to determine the compensation the applicant was entitled to in respect of losses emanating from the denial of access and loss of control, use, and enjoyment of her property between 22 January 1990, the date of Turkey’s acceptance of the compulsory jurisdiction of the Court, and the present time, and made an award accordingly.

## Freedom of movement

### *Sissanis v. Romania*

(23468/02)

**European Court of Human Rights:** Judgment of 25 January 2007

*Preventive measure prohibiting an alien from leaving the territory - Right to freedom of movement - Presumption of innocence - Articles 3, 5 and 6(2) - Article 1 of Protocol No. 1 - Article 2 of Protocol No. 4*

#### Facts

The applicant, Nikolaos Sissanis, is a Greek national who was born in 1952 and lives in Roznov, Romania.

On 10 February 1998, he was convicted under criminal law for tax evasion, forgery and uttering forgeries. On 20 February 1998, the police adopted against him a preventive measure prohibiting him from leaving the country. The letter “C” was consequently stamped in his passport.

From 4 March 1998 on, the police on several occasions seized documents from the commercial companies of which the Applicant was general director. The Applicant lodged an appeal against the preventive measure before the Departmental Tribunal of Constanța, which rejected it on 6 March 1998. The Applicant subsequently learned from the Greek consulate in Romania that on 19 March 1998, the prosecutor had forbidden him from leaving the country for a period of thirty days.

On 14 August 1998, the Applicant asked for the removal of the letter “C” from his passport. On 28 August 1998, the High Court of Constanța ordered the stamp to be removed. On 29 November 2003, the prosecutor asked for the committal for trial of the Applicant. On 24 June 2005, the Applicant was acquitted by the High Court of Constanța.

Additionally, on 31 August 1998, fresh criminal proceedings were brought against the Applicant for deception, falsifying official documents and uttering forgeries. On 2 September 1998, the police of Constanța asked the Aliens, Migration and Passports Office (Ministry of the Interior), to stamp the letter “C” in the Applicant’s passport. On 20 November 1998, the prosecutor asked that the Applicant be remanded in custody for thirty days. On 2 December 1998, the

prosecutor decided to commit him for trial.

The Applicant was consequently detained for two months in the building of the departmental police of Constanța, in detention conditions that could be considered to be degrading, and then transferred to the penitentiary of Poarta Albă following health concerns; however, his detention conditions did not improve there. During that period, he asked many times to be released under judicial control, which was constantly refused.

On 8 June 2000, the Applicant was sentenced by the departmental court of Constanța to two years and ten months imprisonment, unsuspended, and he thus remained in custody. He appealed this decision and relied on Article 140 of the Criminal Procedure Code stating that remand in custody can not last more than half of the maximum sentence provided for by the relevant law. He was subsequently released on 19 July 2000. On 8 March 2006, the Applicant was acquitted by the departmental court of Constanța.

The applicant addressed various requests to the Ministry of the Interior. He twice asked unsuccessfully for the removal of the letter “C” from his passport. On 30 June 2002, he requested information concerning the legal basis of the first measure taken against him. He was told in response that it had been taken in application of Article 27 of Law No 25/1969, which had since been repealed, but continued to apply to his case by virtue of the principle of non-retroactivity.

The applicant further lodged various appeals before the administrative and criminal courts, asking for the cancellation of the preventive measure and the removal of the “C” from his passport. His arguments included that Law 25/1969 had been replaced by Law 123/2001, which stated that such preventive measures prohibiting aliens from leaving the territory had to be taken by a magistrate, whereas in the present case it had been ordered by the police.

The two cases he brought before the criminal courts were rejected; the first in 2001, as he did not bring any proof that the criminal proceedings against him had terminated, and the second in 2004 as an administrative judgment was required. The first case he brought before the administrative courts was rejected on 12 December 2002. On 7 April 2003, the court of appeal of Constanța upheld the judgment.

In 2004, the Applicant brought a second case before the administrative courts. On 29 March 2004, the Neamț Provincial Court ordered the removal of the letter

C from the Applicant's passport, but refused to award him anything for pecuniary and non-pecuniary damages. On 10 June 2004, the stamp was removed from the Applicant's passport.

### Complaints

The Applicant argued that stamping the letter "C" in his passport, together with the preventive measure prohibiting him from leaving the country, had infringed his right to freedom of movement. He relied on Article 2 of Protocol No 4.

He further complained, under Article 6(2), the presumption of innocence, that the authorities had failed in their obligation to analyse the legality and the suitability of this preventive measure.

Furthermore, the Applicant complained, under Article 3, about the degrading detention conditions.

Additionally, he argued that the authorities had infringed Article 5 (1) in relation to the preventive measures taken against him. He further argued that the refusal of the courts to allow him to be released under judicial control was in infringement of Article 5. Moreover, relying on Article 5(3), he complained that his detention had been decided by a prosecutor, which did not match Convention criteria requiring an "officer authorised by law to exercise judicial power" to take such a decision.

The Applicant finally alleged that the authorities had infringed Article 1 of Protocol 1 for not returning the commercial companies' documents seized in 1998.

### Held

The Court found a violation of Article 2 of Protocol No 4 concerning the second preventive measure of 2 September 1998.

Furthermore, the Court held that it was not necessary to examine the merits of the Applicant's complaint under Article 6(2).

The Court found all the other complaints inadmissible.

The Court awarded the Applicant EUR 7,000 for costs and expenses, and EUR 5,000 for non-pecuniary damage.

### Commentary

The Court held that the first preventive measure of 20 February 1998 was illegal, but that the complaint was made too late and had therefore to be rejected under Articles 35(1) and (4) of the Convention (six-month period). This also applied to the complaint under Article 3, as the Applicant's release from custody had happened in 2000, whereas his related complaint had been filed with his observations of 21 March 2006.

The Court also held that Article 5(1) did not apply to the case. The Court distinguished between the "right to liberty" as defined by Article 5(1) of the Convention, and the "right to freedom of movement" under Article 2 of Protocol No 4. The Court noted that in order to determine whether an individual had been arbitrarily deprived of his physical liberty as understood in Article 5(1), details of the concrete situation had to be examined. The Court further declared that the difference between deprivation and restriction of liberty was a matter of degree or intensity, not of nature or essence, and that classification was sometimes hard. In the present case, the Government had interfered in the Applicant's freedom of movement and not in his physical liberty. The Court thus held that the complaint was not admissible under Article 5, as it was manifestly ill-founded.

The two other complaints under Article 5 had to be rejected as they exceeded the six-month period provided for by Article 35(1). The Court held the complaint under Article 1 Protocol No 1 to be manifestly ill-founded, as the seizure of documents was authorised by the criminal procedure code, and rejected it under Article 35(3).

In relation to Article 2 of Protocol No 4, the Court examined Section 27 of Law 25/1969, on which the contentious measure was based. The Court first noted its vagueness, as it allowed the authorities to interfere with aliens' freedom of movement, but did not specify which authority could do so, and on which grounds. The Court further recalled that a democratic society, based on the rule of law, needs sufficient guarantees against abuses on the part of the authorities, including sufficient control over interference in the rights of the individual by the executive power. This control has to be assured, in the last resort, by the judiciary, as it is more likely to be independent and impartial. In this regard, the absence of any review procedure for applying such preventive measures, in the present case, had to be considered as a lack of sufficient safeguards.

Moreover, the same section 27 had been declared unconstitutional by the Romanian Constitutional Court on 11 April 2001, and had thereafter been

modified by law No 123/2001. It was therefore recognised that every measure of that kind had to be taken by a magistrate. As a result, the contentious measure taken by the police, at least from 11 April 2001, was not compatible with domestic law, including the Constitution. Further, the judgment of 29 March 2004 of the Departmental Court of Piatra Neamţ revoking the contentious preventive measure pointed out that it had not been taken by a magistrate; it nevertheless did not award any damages resulting from its illegal prolongation. In light of this, the Court concluded that between 2 September 1998 and 10 June 2004, the interference in the Applicant's freedom of movement had not been "in accordance with the law", violating Article 2 of Protocol No. 4.

## Freedom of elections

### *Russian Conservative Party of Entrepreneurs v. Russia* (55066/00)

**European Court of Human Rights:** Judgment of 30 January 2007

*Right to vote and to be elected – Article 3 of Protocol No. 1, Article 13 and Article 1 of Protocol No. 1*

#### Facts

The applicants are the Russian Conservative Party of Entrepreneurs and two Russian nationals, Aleksandr Anatolyevich Zhukov, who was born in 1949 and lives in Smolensk (Russia), and Viktor Sergeyeovich Vasilyev who was born in 1959 and lives in Moscow.

The Russian Conservative Party of Entrepreneurs is a national political party established under the laws of the Russian Federation. Mr Zhukov stood as one of the party's candidates for the 1999 elections to the State Duma of the Russian Federation, the lower chamber of Parliament. Mr Vasilyev was a party supporter.

On 24 September 1999 the applicant party nominated 151 candidates for the elections to the State Duma and, in October, the Central Electoral Commission (CEC) confirmed receipt of the party's list and the party paid its electoral deposit. On 3 November 1999 the CEC refused registration of the applicant party's list of candidates, having found that certain people on the list, including the candidate listed second, had provided incorrect information about their income and property. Section 51(11) of the 1999 Elections Act provided for

disqualification of the entire party's list in the event of "withdrawal" of one of the top three candidates on the list. That provision was interpreted by the CEC as encompassing all instances of "withdrawal", whether voluntary or not. As a result, all candidates on the list, Mr Zhukov among them, were disqualified.

Disagreeing with the CEC's interpretation, the applicant party successfully challenged its decision before the domestic courts. On 22 November 1999 the applicant party obtained a final judgment to the effect that section 51(11) applied only if the "withdrawal" had been voluntary. The judgment was immediately enforced and, that same day, the CEC registered the applicant party and allowed it to carry on its electoral campaign.

Nevertheless, on 26 November 1999 a deputy prosecutor general lodged an application for supervisory review, requesting the Supreme Court to reopen the proceedings and to accept the CEC's original broad interpretation of section 51(11). The Presidium of the Supreme Court subsequently quashed the earlier judgments by way of supervisory-review proceedings and upheld the CEC's position.

On 9 December 1999 the CEC annulled its earlier decisions, refused the registration of the applicant party's list and ordered the applicant party's name to be removed from the ballot papers. The applicant party appealed unsuccessfully. On 19 December 1999 the elections to the State Duma took place. The applicant party was not listed in the voting papers.

On 25 April 2000 the Constitutional Court of the Russian Federation declared unconstitutional the part of section 51(11) which provided for the refusal or cancellation of a party's registration in the event of the withdrawal of one of its top three candidates. However, the Constitutional Court also ruled that the finding that section 51(11) was unconstitutional was of no consequence for the State Duma elections of 19 December 1999 and could not be relied upon to seek a review of the election results.

All further appeals by the applicant party were unsuccessful, including its application to have its election deposit returned.

### Complaints

The applicants alleged that the right of the Russian Conservative Party of Entrepreneurs and Mr Zhukov to stand for election were violated, as was Mr

Vasilyev's right to vote for the party of his choice, relying on Article 3 of Protocol No 1.

The applicant party also complained about the domestic authorities' refusal to return its election deposit, under Article 1 of Protocol No 1.

The applicants complained that they had had no effective remedy in respect of the breach of Article 3 of Protocol No. 1. The Court has decided to examine this complaint under Article 13 of the Convention.

#### Held

The Court held unanimously that there had been a violation of Article 3 of Protocol No. 1 in respect of the Russian Conservative Party of Entrepreneurs and one of the party's candidates for the 1999 general election in the Russian Federation.

The Court did not however find that there had been a violation of Article 3 of Protocol No. 1 concerning a prospective voter in those elections.

The Court also found that there had been a violation of Article 13 of the Convention in respect of the applicant party and its candidate, but no violation of Article 13 concerning the voter.

It further held that there had been a violation of Article 1 of Protocol No. 1 concerning the applicant party regarding the domestic authorities' refusal to return its election deposit.

The Court awarded the applicant party 2,315,520 Russian roubles (RUR) (approximately 66,432 euros (EUR)) for pecuniary damage and RUR 196,677 (approximately EUR 5,643) for costs and expenses.

#### Commentary

In relation to the alleged violation of the applicants' right to stand for election, the Court noted that the final and enforceable judgment of 22 November 1999, which cleared the way for the applicant party and Mr Zhukov to stand in the elections, was quashed by means of supervisory-review proceedings on an application by a State official who was not a party to the proceedings. The purpose of this application was precisely to obtain a fresh determination of the issue that had been already settled. The Government did not point to any circumstances of a substantial and compelling character that could have justified that departure

from the principle of legal certainty in the applicants' case. As a result of the re-examination, the applicant party and Mr Zhukov were prevented from standing for election. It followed that, by using the supervisory-review procedure to set aside the judgment of 22 November 1999, the domestic authorities violated the principle of legal certainty in the procedure for determining the applicant party's and Mr Zhukov's eligibility to stand in the elections.

Concerning whether the decision to disqualify the applicant party and Mr Zhukov from standing in the election was proportionate to the legitimate aims pursued, the Court found that requiring a candidate for election to the national parliament to make his or her financial situation publicly known pursued a legitimate aim, in that it enabled voters to make an informed choice and promoted the overall fairness of elections.

In a party-list proportional representation system, where a voter votes for a party list on the understanding that candidates placed higher on the list had more chances of obtaining seats in the parliament, it was not surprising that political parties placed the most well-liked or charismatic figures at the top of their lists. Legal provisions reinforcing the bond between the top candidates and the entire party list were therefore instrumental for promoting the emergence of coherent political thinking, which was also a legitimate aim under the terms of Article 3 of Protocol No. 1.

The Court observed that neither the applicant party nor Mr Zhukov had been found to have been in breach of the electoral laws. Thus, it was not their own conduct that led to their ineligibility or disqualification. They were sanctioned for circumstances which were both unrelated to their own conduct and outside their control. The Court considered that their disqualification for those reasons was disproportionate to the legitimate aims pursued. The Court added that that was also the view of the Russian Constitutional Court. It followed that there had been a violation of Article 3 of Protocol No. 1 in respect of the applicant party and Mr Zhukov.

Concerning Mr Vasilyev's complaint that it had been impossible for him to cast his vote for a party of his choosing – the applicant party – which had been denied registration for the election, the Court did not consider that an allegedly frustrated voting intention could be considered grounds for an arguable claim of a violation of the right to vote.

An intention to vote for a specific party was essentially a thought; its existence could not be proved or disproved until and unless it had manifested itself

through the act of voting or handing in a blank or spoiled paper. An individual applicant had to be able to claim to be actually affected by the measure of which he complained. Mr Vasilyev did not furnish any information about the way in which he had exercised his right to vote.

The Court concluded that the right to vote could not be construed as laying down a general guarantee that every voter should be able to find on the ballot paper the candidate or the party he or she had intended to vote for. It reiterated, nevertheless, that the free expression of the opinion of the people was inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population. Accordingly, it had to be regarded in the broader context in which the right to vote could be exercised by Mr Vasilyev.

The Court noted that more than 25 political parties and electoral blocs representing a broad gamut of political views and platforms competed in the 1999 elections to State Duma. The elections were acclaimed as competitive and pluralistic by international observers. It was not alleged that the voters lacked sufficient or adequate information about the candidates. Nor had it been claimed that Mr Vasilyev was subjected to any form of pressure or undue inducement in his voting choices. It could not therefore be said on the basis of the information available that Mr Vasilyev's right to take part in free elections had been unduly restricted. There had therefore been no violation of Article 3 of Protocol No. 1 as regards Mr Vasilyev's right to vote.

### ***Yumak and Sadak v. Turkey***

(10226/03)

**European Court of Human Rights:** Judgment of 30 January 2007

*Excessive national electoral threshold – Right to free expression of the opinion of the people in the choice of the legislature – Article 3 of Protocol No. 1*

#### Facts

Mehmet Yumak and Resul Sadak are Turkish nationals who were born in 1962 and 1959 respectively and live in Şırnak (Turkey).

The application concerns Turkish electoral law, according to which a party must obtain at least 10% of the national vote in parliamentary elections in order to win seats in the National Assembly.

In the parliamentary elections of 3 November 2002 the applicants stood as candidates for the political party DEHAP (Democratic People's Party) in the province of Şırnak. As a result of the ballot, DEHAP obtained approximately 45.95% of the vote (47,449 votes) in Şırnak province, but did not secure 10% of the vote nationally. The applicants were not elected, in accordance with section 33 of the Election of Members of Parliament Act (Law No. 2939), which states that "parties may not win seats unless they obtain, nationally, more than 10% of the votes validly cast". Consequently, of the three parliamentary seats allotted to Şırnak province, two were filled by the AKP (Justice and Development Party), which obtained 14.05% of the vote (14,460 votes), and the third by an independent candidate, Mr. Tatar, who obtained 9.69% of the vote (9,914 votes).

### Complaints

Relying on Article 3 of Protocol No. 1, the applicants submitted that setting a threshold of 10% of the vote in parliamentary elections interfered with the free expression of the opinion of the people in their choice of the legislature.

### Held

The Court held by 5 votes to 2 that there had been no violation of Article 3 of Protocol No 1.

### Commentary

The Court noted that the 10% threshold for obtaining seats in the Turkish Parliament was laid down in section 33 of law no. 2839. It had been introduced well before the elections of 3 November 2002, so that the applicants could have foreseen that if their party did not cross the threshold they could not win any parliamentary seats, irrespective of the number of votes they obtained in their electoral constituency.

The Court accepted that the purpose of the measure was to avoid excessive parliamentary fragmentation and reinforce government stability, regard being had in particular to the period of instability which Turkey had been through in the 1970s.

As regards the proportionality of the measure, the Court observed that the Turkish electoral system, which had a high threshold without any corrective counterbalances, had produced in Turkey, after the elections of 3 November 2002, the least representative parliament since the introduction of the multi-party system in 1946. In concrete terms, 45.3% of the electorate (about 14.5 million voters) was completely unrepresented in parliament.

However, an analysis of the results of parliamentary elections held since the adoption of the threshold showed that it could not as such block the emergence of political alternatives within society. Similarly, the Court noted with interest the Government's argument that the aim of the threshold was to give small parties the possibility of establishing themselves nationally and thus form part of a national political project.

In that connection, the Court acknowledged that the Turkish authorities, both judicial and legislative, but also politicians, were best placed to assess the choice of an appropriate electoral system, and that it could not propose an ideal solution which would correct the shortcomings of the Turkish electoral system. However, it noted that of all the systems used in the member states of the Council of Europe, the 10% threshold applied in Turkey appeared to be the highest.

Consequently, while noting that it was desirable for the threshold to be lowered and/or for corrective counterbalances to be introduced to ensure optimal representation of the various political tendencies without sacrificing the objective sought (the establishment of stable parliamentary majorities), the Court considered that it was important to leave the state concerned sufficient latitude. In that connection, it also attached importance to the fact that the electoral system was the subject of much debate within Turkish society and that numerous proposals of ways to correct the threshold's effects were being made both in parliament and among leading figures of civil society. What was more, as early as 1995, the Constitutional Court had stressed that the constitutional principles of fair representation and governmental stability necessarily had to be combined in such a way as to balance and complement each other.

That being so, the Court considered that Turkey had not overstepped its wide margin of appreciation with regard to Article 3 of Protocol No. 1, notwithstanding the high threshold.

### ***Kavakçı, v. Turkey***

(71907/01)

**European Court of Human Rights:** Judgment of 5 April 2007

*Stripping of a dissolved party member's nationality and parliamentary status - Right to free elections – Articles 6, 9, 14, and Article 3 of the Protocol No. 1*

### Facts

The applicant, Merve Safa Kavakçı, is a Turkish national who was born in 1968 and lives in Ankara, Turkey.

On 18 April 1999, she was elected at the Turkish Grand National Assembly as a member of *Fazilet Partisi* (the Virtue Party). On 2 May 1999, she attempted to take her oath before the National Assembly wearing an Islamic headscarf. She was forced to leave the Assembly due to the strong protests of some members of parliament.

On 7 May 1999, the Principal State Counsel applied to the Constitutional Court for an order dissolving *Fazilet*, on the ground that it had become a centre of activities contrary to the principle of secularism and was a continuation of *Refah Partisi*, which had been dissolved. It also requested that the applicant be stripped of her parliamentary status and that measures be taken in order to temporarily restrict her political rights.

On 13 May 1999, the applicant was stripped of her Turkish nationality under domestic law, on the ground that she had acquired US nationality on 5 March 1999 without the prior agreement of the Turkish authorities. On 17 May 1999, the High Electoral Council declared that the National Assembly therefore had to strip her of her parliamentary status. The applicant then appealed this decree, before the Council of State, requesting, among other things, the rights and immunities attached to her election as a parliamentary member. On 28 October 1999, the applicant married a Turkish national and thus re-acquired Turkish nationality.

On 8 February 2000, the Council of State rejected the applicant's appeal. On 16 June 2000, the joint chambers of administrative affairs of the Council of State upheld the decision; in December, they further rejected the applicant's request. On 14 March 2001, the Speaker of the National Assembly stripped the applicant of her parliamentary status as the stripping of her nationality had become definitive.

On 22 June 2001 the Constitutional Court dissolved the *Fazilet* party, on the ground that it had become a "centre of activities contrary to the principle of secularism". The decision was based on Articles 68 and 69 of the Constitution and Law no. 2820 on political parties. The Court took account of the actions and statements of certain leaders and members of the party, including the applicant, who advocated the wearing of Islamic headscarves in State universities and

premises belonging to public authorities, despite the Constitutional Court ruling that that infringed the principle of secularism enshrined in the Constitution. Given the electoral potential of the party, it considered that this situation represented a danger for the secular democratic order and that the party's dissolution met a pressing social need.

The applicant was removed from her parliamentary seat. As an ancillary measure under Article 69(9) of the Constitution, the Court banned her from becoming a founder member, ordinary member, leader or auditor of any other political party for five years.

#### Complaints

The applicant alleged that her nationality and parliamentary status had been removed because of her religious beliefs and of their manifestation. She relied on Article 9 of the Convention.

Relying on both Article 6(1) of the Convention and Article 3 of Protocol No. 1, the applicant complained about the stripping of her parliamentary status and the limitations to her political rights. She explained that the decision to remove her nationality was ill-founded.

The applicant further alleged that there had been a violation of Article 14 of the Convention, as she had been discriminated against on the basis of her beliefs.

#### Held

The Court held that Article 3 of Protocol No. 1 to the Convention had been violated.

The Court further held that it was not necessary to examine separately the complaints under Articles 6, 9 and 14 of the Convention.

The Court considered that the finding of a violation constituted in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant. The Court awarded the applicant EUR 4,000 for costs and expenses.

#### Commentary

The Court noted that the temporary restrictions imposed on the applicants' political rights had been intended to preserve the secular nature of the Turkish political system. Given the importance of that principle, it considered that the measure had pursued legitimate aims.

The Court then examined the dissolution of the *Fazilet*, as the restriction of the applicant's political rights was its direct consequence. The Court further noted that Article 69(6) of the Turkish Constitution, at the time, had too wide a scope. All actions and statements by party members could indeed be imputed to the party for ruling on its dissolution, irrespective of their involvement in the party's activities. Finally, the Court considered that the sanctions imposed on the applicants were serious and could not be regarded as proportionate to the legitimate aims pursued.

The Court therefore concluded that there had been a violation of Article 3 of Protocol No. 1 and did not consider it necessary to examine separately the complaint as to the removal of the applicant's parliamentary status.

## C. UN Cases

### Prohibition of torture

#### *A. H. v. Sweden*

(265/2005)

**Committee Against Torture:** Decision of 21 November 2006

*Deportation of an asylum seeker - Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

#### Facts

The complainant, A. H., is an Azeri national who was born in 1971 and was detained in Sweden and awaiting deportation to Azerbaijan the time of submission of the complaint.

The complainant belongs to the Talysh minority group in Azerbaijan. He joined the Talysh separatist movement lead by Alakram Hummanov, which aimed to establish a Talysh republic. He left this group in 1994 and moved to Baku, where he lived until he fled to Sweden.

The complainant claimed to have been an active member of the Azerbaijani Democratic Party (ADP), a registered opposition party to the current regime. He contended that his political activities were carried out in the district of Khatai and included, among others, organising demonstrations against the regime. He

claimed to have been seen on television on several occasions in the framework of these activities.

In 2001, the complainant was summoned by the police in several occasions and interrogated about the leader of the Talysh separatist movement, Hummanov. On 15 June 2001, plainclothes policemen searched the complainant's home in Baku and seized some documents and recordings. He was arrested and taken to premises of the Ministry of National Security in Baku, where he was repeatedly beaten. He was then taken to a "police house" and locked in a cell in the basement, where he was kept for approximately a year. He contends that, during his detention, he was beaten on numerous occasions, that he was not allowed to go out or speak to anyone, and was never informed of the duration of his detention. He further contends that his case was never tried by a court and that no lawyer was appointed to him.

In May 2002, he fell ill and was brought to a KGB hospital, which also treated prisoners. Whilst he was in hospital, his father and the secretary general of the ADP, Sardar Jalaloglu, organised his escape and obtained, through bribery, a party membership card and a driver's license in his name. A visitor delivered these documents to the complainant. On the 14 November 2002, the complainant walked out of hospital dressed in military clothes, with the help of a soldier connected to Jalaloglu, while guards were busy with phone calls and visitors. That night he crossed the Azeri border to the Russian region of Dagestan. He arrived in Sweden via Kaliningrad on 19 November 2002, with a forged Dutch passport. The day after his arrival, he applied for asylum.

By decision of 4 July 2003, the Swedish Migration Board rejected the complainant's application. The Board denied the existence of pronounced discrimination against Talysh population in Azerbaijan and questioned the credibility of the complainant's explanation as to how he had managed to escape from hospital and how his driver's licence had been issued.

On 8 July 2003, the complainant appealed to the Aliens Appeals Board. On 10 October 2003, this Board received a letter from the German authorities, in reply to a request for information made under the Dublin Convention, where it was stated that the complainant had applied for asylum in Germany on 25 July 1995. On 10 October 2003 and 3 March 2004, the complainant presented submissions to the Board, enclosing medical reports from the Crisis and Trauma Centre at Danderyd hospital, issued on 18 and 19 February 2004, respectively. These reports confirmed that he had been subjected to acts of torture as described by

him, including systematic beatings, electroshocks and sitting on iron bars for a long time. It concluded that the complainant's scars and injuries corresponded to acts of torture suffered in 2001.

In a further submission to the Board, on 17 December 2004 the complainant stated that his brother had arrived in Sweden and applied for asylum and that Jalaloglu had been arrested in Azerbaijan and the complainant, among others, was being sought by the Azerbaijani authorities. A wanted notice, including a photo of the complainant, had been issued by the Ministry of Internal Affairs, Department of Criminal Investigations of Baku, and posted at police stations around Baku. He was allegedly accused of "belonging to the ADP and of having left the country and instigating rebellion for having disseminated oppositional ideas". He contended that his brother had informed him that their father had also been arrested in Baku two months after the complainant's departure from Azerbaijan.

On 4 February 2005, the Aliens Appeals Board rejected the complainant's appeal. While it accepted that the complainant had been imprisoned and subjected to torture as indicated in the medical reports, it considered that "these incidents could not be attributed to Azeri authorities but should be viewed as criminal acts performed by certain individuals overstepping their powers." It further questioned the duration of the complainant's detention and the circumstances of his escape and found that he had not been able to demonstrate that he was wanted on political grounds nor that he had been politically active to the extent that he would risk being persecuted by Azeri authorities.

### Complaints

The complainant claimed that his deportation to Azerbaijan would constitute a violation of Article 3 of the Convention. He maintained that if he were to be returned to Azerbaijan, he would risk detention and torture again, on grounds of his close connection with the ADP and especially considering that a wanted notice had been issued and distributed in police stations around Baku.

### Held

The Committee held that the removal of the complainant to Azerbaijan would not constitute a breach of Article 3 of the Convention. In light of all the above, the Committee was not persuaded that the complainant would face a real, personal, and foreseeable risk of torture if deported to Azerbaijan.

### Commentary

According to the Committee, it is undisputed that the complainant was a

member of ADP and that he was subjected to acts of torture in 2001 and 2002 as confirmed by the medical reports submitted by him. Nevertheless, it concludes that the complainant had failed to provide evidence about his high position within the party or the conduct of any political activity of such significance that he would face foreseeable, real and personal risk of being subjected to torture upon his return to Azerbaijan.

The Committee further noted that the author had not been able to provide, as requested by the Committee, a full copy of the wanted notice presented to the Swedish Migration Board. Additionally, it noted that the wanted notice presented numerous inconsistencies and did not reveal, in any case, that the complainant was wanted in Azerbaijan.

The Committee considered that the complainant had failed to disprove the State party's findings in this regard, and to validate the authenticity of the document in question. It recalled its jurisprudence that it is for the complainant to collect and present evidence in support of his account of events.

## Freedom of association

### *Boris Zvozkov et al. v. Belarus*

(1039/2001)

**Human Rights Committee:** Decision of 10 November 2006

*Refusal to register a Human Rights association- Right to freedom of association – Articles 2 (1), 22 (1 and 2) and 26 of the International Covenant on Civil and Political Rights*

#### Facts

The Complainant Boris Igorevich Zvozkov is a Russian national. He was born in 1949 and lives in Minsk, Belarus. The communication is presented in his own name and on behalf of 33 other individuals of Belarusian, Polish, Russian, Latvian and Lithuanian nationalities, all residing in Belarus.

On 11 July 2001, the Ministry of Justice of the State Party rejected the registration application of the non-governmental human rights public association “Helsinki XXI”, established on 12 November 2000 to help with the implementation of the U.N. Declaration on the Right and Responsibility of Individuals, Groups and

Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (the Declaration) in Belarus.

The Ministry mainly based its refusal to register this association under the regulations “On State Registration (Re-registration) of Political Parties, Trade Unions and Other Public Associations” (the Regulations). According to the Ministry, one of the “Helsinki XXI” statutes aimed to represent and to defend the rights of third persons, which was contrary to the Declaration, the Belarus Constitution and other laws.

On 18 July 2001, the author and two other founders appealed the Ministry’s decision to the Supreme Court. They challenged the lawfulness of the decision, on the grounds that contrary to the Ministry’s assertion, the law of Belarus does not prohibit representing and defending the rights of third persons.

The Supreme Court upheld in its judgment of 20 August 2001 the decision of the Ministry that the “Helsinki XXI” statutes on the representation and defence of the rights of third persons were not in conformity with domestic law. The Court referred to paragraph 11 of the Regulations governing the refusal of registration of an association where its statutes are not in conformity with legal requirements. The Supreme Court’s refusal to register “Helsinki XXI” as a public association was not open to appeal.

### Complaints

The author submitted that the refusal to register “Helsinki XXI” and the failure of Belarus courts to grant their appeal, amount to a violation of their rights under article 22, paragraph 1, of the Covenant.

The author contended that the requirements for registration of a public association established under the State party’s laws are impermissible restrictions of his and the other 33 co-authors’ right to freedom of association and are not necessary in the interests of national security, public safety, order, health, or morals, or the rights and freedoms of others (article 22, paragraph 2).

The author also claimed that the refusal to register the organisation constituted discrimination by the state party towards him and the other 33 co-authors, contrary to Article 2 and Article 26 of the Covenant.

### Held

The Committee held that the Belarus authorities’ refusal to register “Helsinki

XXI” unreasonably restricted the author and the other 33 co-authors’ right to freedom of association, in violation of Article 22, paragraph 1, of the Covenant.

### Commentary

The Committee observed that, in accordance with Article 22, paragraph 2, any restriction on the right to freedom of association must cumulatively meet the following conditions: (a) it must be provided by law; (b) may only be imposed for one of the purposes set out in paragraph 2; and (c) must be “necessary in a democratic society” for achieving one of these purposes. The reference to “democratic society” in the context of article 22 indicates, in the Committee’s opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably viewed by the government or the majority of the population, is a cornerstone of a democratic society.

The Committee noted that the author and the state party disagreed on whether domestic law indeed prohibits the defence of the rights and freedoms of citizens who are not members of a particular association. Secondly, it considered that even if such restrictions were indeed prescribed by law, the state party had not advanced any argument as to why it would be “necessary”, for purposes of Article 22, paragraph 2, to make the registration of an association conditional on limiting the scope of its activities to the exclusive representation and defence of the rights of its own members. Taking into account the consequences of the refusal of registration, that is, the of the fact that operation of unregistered associations is illegal on the State party’s territory, the Committee concluded that the refusal of registration does not meet the requirements of Article 22, paragraph 2. The authors’ rights under Article 22, paragraph 1, had thus been violated.

## **Right to vote and to be elected**

### ***Leonid Sinitsin v. Belarus***

(1047/2002)

**Human Rights Committee:** Decision of 16 January 2007

*Ruling on the invalidity of a candidate’s nomination and refusal to register a candidacy for political elections - Right to vote and to be elected – Articles 14(1) and 25 (b), read in conjunction with article 2 of the International Covenant on Civil and Political Rights*

### Facts

The author, Mr. Leonid Georgievich Sinitsin, is a Belarusian national, who was born in 1954 and lives in Minsk, Belarus.

The author, then Vice-President of the Public Association “Social Technologies”, was nominated as a candidate for the 2001 presidential elections in Belarus. An initiative group created to this end collected some 130,000 signatures in support of the author’s nomination and submitted more than 110,000 signatures to the Electoral Commissions, although Article 61 of the Belarus Electoral Code only requires the submission of 100,000 for the official registration of a candidate. All the documents required for the official registration of the author as a candidate for the presidential elections were submitted within the time limits specified by law.

On 25 July 2001, the Central Electoral Commission on Elections and Conduct of Republican Referendums (CEC) refused to accept 14,000 signatures that were collected before the cut-off date of 20 July 2001 but were not submitted to the Electoral Commissions.

On 8 August 2001, the CEC adopted a ruling stating that the total number of signatures in support of the author’s nomination was only 80,540. The CEC thus declared that the author’s nomination was invalid.

On 10 August 2001, the author appealed to the Supreme Court the CEC ruling of 8 August 2001 on the invalidity of his nomination. Although the Electoral Code does not envisage any right to appeal a ruling on this matter to a court, the author referred to Article 341, part 1, of the Civil Procedure Code of Belarus and Article 60, part 1, of the Belarus Constitution. The former allows judicial review of the decisions of the Electoral Commission related to discrepancies in lists of signatures and other matters provided by law; the latter guarantees to everyone a protection of his rights and liberties by a competent, independent and impartial court of law within the time limits specified in law.

On 14 August 2001, the Supreme Court refused to institute proceedings, on the grounds that the applicant did not have the right to file such a suit in court. The Court added that neither the Electoral Code nor legislation as such envisaged any procedure of judicial review of the CEC ruling on the invalidity of a candidate’s nomination. The Supreme Court’s decision was final.

On 20 August 2001, the author filed a complaint with the Chairman of the

Supreme Court, requesting him to bring a supervisory protest to the ruling of the Supreme Court of 14 August 2001. He received no reply. On an unspecified date, a similar complaint was filed with the General Prosecutor of Belarus; no reply was received.

The period for the registration of presidential candidates ran from 4 to 14 August 2001. On 14 August 2001, the author learned from a CEC media statement that he was not a registered candidate. Contrary to the requirement of Article 68, part 11 of the Electoral Code, the CEC had not issued a reasoned decision on the refusal to register him as a candidate. On 16 August 2001, the author requested the CEC to provide him with a copy of its decision. On 17 August 2001, he received a reply, stating that there were no legal grounds for his registration as a presidential candidate. The author appealed the refusal to register him as a candidate to the Supreme Court, in accordance with the procedure established by Article 68, part 14, of the Electoral Code. On 20 August 2001, the Supreme Court returned the author's complaint without consideration, on the ground that it had already decided on the refusal to institute proceedings related to the CEC ruling of 8 August 2001.

### Complaints

The author claimed that through the CEC decision of 8 August 2001 on the invalidity of his nomination, the State party violated his right under Article 25(b) of the Covenant to be elected at genuine periodic elections, guaranteeing the free expression of the will of the electors without any of the distinctions mentioned in Article 2 of the Covenant and without unreasonable restrictions.

The author maintained that, in breach of Article 14, paragraph 1, read in conjunction with Article 2 of the Covenant, the courts on two occasions erroneously denied him the right to have his rights and obligations determined in a suit at law by a competent, independent and impartial tribunal established by law.

### Held

The Committee held that the absence of an independent and impartial remedy to challenge the CEC ruling on the invalidity of the author's nomination and, in the present case, the CEC refusal to register his candidacy, resulted in a violation of his rights under Article 25 (b) of the Covenant, read in conjunction with Article 2.

In accordance with Article 2, paragraph 3 (a), of the Covenant, the State party

is under an obligation to provide the author with an effective remedy, namely, compensation for damages incurred in the 2001 Presidential campaign. It is also under an obligation to take steps to prevent similar violations occurring in the future.

### Commentary

The Committee observed that the exercise of the right to vote and to be elected may not be suspended or excluded except on grounds, established by law, which are objective and reasonable.

The Committee recalled that Article 2, paragraph 3, of the Covenant guarantees an effective remedy to any person claiming a violation of the rights and freedoms spelled out in the Covenant. In the present case, no effective remedies were available to the author to challenge the CEC ruling declaring his nomination invalid, nor could he challenge the subsequent refusal by the CEC to register him as a Presidential candidate before an independent and impartial body.

The Committee decided that the complaint with respect to Article 14, paragraph 1, was inadmissible, although implicitly rather than explicitly, by declaring admissibility with respect to Articles 25 and 2 of the Covenant, without deciding whether the complaint raised issues relating to Article 14.

## **Freedom of thought, conscience and religion**

### ***Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea***

(1321/2004 and 1322/2004)

**Human Rights Committee:** Decision of 23 January 2007

*Conscientious objection against military service- Right to freedom of thought, conscience and religion – Article 18 (1) of the International Covenant on Civil and Political Rights*

### Facts

The authors, Mr. Myung-Jin Choi and Mr. Yeo-Bum Yoon, are nationals of the Republic of Korea, who were born in 1981 and 1980, respectively.

The authors are Jehovah's Witnesses. In February 2001, the State party's Military Power Administration sent both applicants a notice of draft for military service. On account of their religious belief and conscience, the authors refused to be

drafted within the prescribed period of time, whereupon they were arrested and sentenced to one and a half years of imprisonment.

### Complaints

The authors complained that the absence in the State party of an alternative to compulsory military service, under pain of criminal prosecution and imprisonment, breaches their rights under Article 18, paragraph 1, of the Covenant.

### Held

The Committee held that the State party breached Article 18, paragraph 1, of the Covenant by prosecuting and sentencing the authors for their refusal to perform compulsory military service on account of their religious beliefs as Jehovah's Witnesses. It stated that the fundamental human right to conscientious objection entitles any individual to an exemption from compulsory military service if this cannot be reconciled with that individual's religion or beliefs. That right must not be impaired by coercion.

### Commentary

The State party commented that Article 19 of its Constitution does not grant one the right to object to fulfilling one's military service duty. The State party also argued that conscientious objection may be "restricted" in order to maintain its national defensive capacities and to preserve social cohesion. It concluded that the prohibition of conscientious objection to military service is justified and that, given the wording of article 18, paragraph 3, it does not violate the Covenant. The Constitutional Court would limit the right to freedom of conscience to a mere right to request the State to consider and protect the objector's right "if possible".

The Committee observed that while the right to manifest one's religion or belief does not as such imply the right to refuse all obligations imposed by law, it provides certain protection, consistent with Article 18, paragraph 3, against being forced to act against genuinely-held religious belief.

The Committee also recalled its general view expressed in General Comment 22 that to compel a person to use lethal force, although such use would seriously conflict with the requirements of his conscience or religious beliefs, falls within the ambit of Article 18.

The Committee noted, in the instant case, that the authors' refusal to be drafted

for compulsory service was a direct expression of their religious beliefs, which it is uncontested were genuinely held. The authors' conviction and sentence, accordingly, amounts to a restriction on their ability to manifest their religion or belief. Such restriction must be justified by the permissible limits described in paragraph 3 of article 18, that is, that any restriction must be prescribed by law and be necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. However, such restriction must not impair the very essence of the right in question.

The Committee observed that under the laws of the State party there is no procedure for recognition of conscientious objections against military service. It took note of the State party's argument on the particular context of its national security, as well as of its intention to act on the national action plan for conscientious objection devised by the National Human Rights Commission. The Committee also detected, in relation to relevant State practice, that an increasing number of those States parties to the Covenant which have retained compulsory military service have introduced alternatives to compulsory military service, and considered that the State party had failed to show what special disadvantage would be involved for it if the rights of the authors' under Article 18 would be fully respected.

As to the issue of social cohesion and equitability, the Committee considered that respect on the part of the State for conscientious beliefs and manifestations thereof is itself an important factor in ensuring cohesive and stable pluralism in society. It likewise observed that it is in principle possible, and in practice common, to conceive alternatives to compulsory military service that do not erode the basis of the principle of universal conscription but render equivalent social good and make equivalent demands on the individual, eliminating unfair disparities between those engaged in compulsory military service and those in alternative service. The Committee, therefore, considered that the State party has not demonstrated that in the present case the restriction in question is necessary, within the meaning of Article 18, paragraph 3, of the Covenant.

## Section 4: Appendices



## Appendix 1

European Court of Human Rights – Composition of the Court as at May 2007

Last update: 02/04/2007

### Composition of the Sections

<b>Section I</b>	<b>Section II</b>	<b>Section III</b>	<b>Section IV</b>	<b>Section V</b>
M. C.L. Rozakis <b>President</b>	Mme F. Tulkens <b>President</b>	M B.M. Zupančič <b>President</b>	Sir Nicolas Bratza <b>President</b>	M. P. Lorenzen <b>President</b>
M. L. Loucaides <b>Vice-President</b>	M. A.B. Baka <b>Vice-President</b>	M. C. Birsan <b>Vice-President</b>	M. J. Casadevall <b>Vice-President</b>	Ms S. Botoucharova <b>Vice-President</b>
Mme N. Vajić	M. I. Cabral Barreto	M. J.-P. Costa	M. G. Bonello	M. L. Wildhaber
M. A. Kovler	M. R. Türmen	Mme E. Fura-Sandström	M. K. Traja	M. K. Jungwiert
Mme E. Steiner	M. M. Ugrekhelidze	Mme A. Gyulumyan	M. S. Pavlovski	M. V. Butkevych
M. K. Hajiyeve	Mr V. Zagrebelsky	M. E. Myjer	M. L. Garlicki	Mme M. Tsatsa-Nikolovska
M. D. Spielmann	Mme A. Mularoni	M. D. Björgvinsson	Mme L. Mijović	M. R. Maruste
M. S. E. Jebens	Mme D. Jočienė	Mme I. Ziemele	M. J. Šikuta	M. J. Borrego Borrego
M. G. Malinverni	M. D. Popović	Mme Berro-Lefèvre	Mme P. Hirvelä	Mme R. Jaeger
		Mme Berro-Lefèvre		M. M. Villiger

#### Section Registrars

S. Nielsen	S. Dollé	S. Quesada	L. Early	C. Westerdiek
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#### Deputy Section Registrars

F. Elens-Passos	S. Naismith	F. Araçı	S. Phillips
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## Appendix 2

## Judgments, by respondent State (2006)

Eilat	Arrêts (fond)	Arrêts (définitif-après renvoi devant la Grande Chambre)	Arrêts (satisfaction équitable)	Arrêts (réglement amiable)	Arrêts (radiation)	Arrêts (exceptions préliminaires)	Arrêts (interprétation)	Arrêts (révision)
State	Judgments (merits)	Judgments (final-after referral to Grand Chamber)	Judgments (just satisfaction)	Judgments (friendly settlements)	Judgments (striking out)	Judgments (preliminary objections)	Judgments (interpretation)	Judgments (revision)
Albania/Albanie	2	-	-	-	-	-	-	-
Andorra/Andorre	-	-	1	-	-	-	-	-
Armenia/Arménie	-	-	-	-	-	-	-	-
Austria/Autriche	21	-	-	-	-	-	-	-
Azerbaijan/Azerbaïdjan	1	-	-	-	2	-	-	-
Belgium/Belgique	5	-	-	2	-	-	-	-
Bosnia and Herzegovina/Bosnie-Herzégovine	1	-	-	-	-	-	-	-
Bulgaria/Bulgarie	45	-	-	-	-	-	-	-
Croatia/Croatie	22	-	-	-	-	-	-	-
Cyprus/Cypr	15	-	-	-	-	-	-	-
Czech Republic/Republique Tchèque	38	-	1	-	-	-	-	-
Denmark/Danemark	2	-	-	-	-	-	-	-
Estonia/Estonie	1	-	-	-	-	-	-	-
Finland/Finlande	15	-	1	1	-	-	-	-
France/France	91	2	2	1	-	-	-	-
Georgia/Géorgie	5	-	-	-	-	-	-	-
Germany/Allemagne	8	-	-	2	-	-	-	-
Greece/Grèce	53	-	1	1	-	-	-	-
Hungary/Hongrie	32	-	-	-	-	-	-	-
Iceland/Islande	-	-	-	-	-	-	-	-
Ireland/Irlande	-	-	-	-	-	-	-	-
Italy/Italie	92	9	-	2	-	-	-	-
Latvia/Lettonie	9	1	-	-	-	-	-	-

## Judgments, by respondent State (2006)

Etat	Arrêts (fond)	Arrêts (définitif-après renvoi devant la Grande Chambre)	Arrêts (satisfaction équitable)	Arrêts (réglement amiable)	Arrêts (radiation)	Arrêts (exceptions préliminaires)	Arrêts (interprétation)	Arrêts (révision)
State	Judgments (merits)	Judgments (final-after referral to Grand Chamber)	Judgments (just satisfaction)	Judgments (friendly settlements)	Judgments (striking out)	Judgments (preliminary objections)	Judgments (interpretation)	Judgments (revision)
Liechtenstein/Liechtenstein	1	-	-	-	-	-	-	-
Lithuania/Lituanie	6	-	-	-	1	-	-	-
Luxembourg/Luxembourg	2	-	-	-	-	-	-	-
Malta/Malte	8	-	-	-	-	-	-	-
Moldova/Moldavie	18	-	2	-	-	-	-	-
Monaco/Monaco	-	-	-	-	-	-	-	-
Netherlands/Pays-Bas	7	-	-	-	-	-	-	-
Norway/Norvège	1	-	-	-	-	-	-	-
Poland/Pologne	114	1	-	-	-	-	-	-
Portugal/Portugal	4	-	1	-	-	-	-	-
Romania/Roumanie	67	-	1	5	-	-	-	-
Russia/Russie	102	-	-	-	-	-	-	-
San Marino/Saint-Marin	-	-	-	-	-	-	-	-
Serbia and Montenegro/Sérbie-Monténégro	1	-	-	-	-	-	-	-
Slovak Republic/Republique Slovaque	34	-	-	-	-	-	-	-
Slovenia/Slovénie	189	-	-	-	1	-	-	-
Spain/Espagne	5	-	-	-	-	-	-	-
Sweden/Suède	5	-	-	2	1	-	-	-
Switzerland/Suisse	9	-	-	-	-	-	-	-
FYRO Macedonia/ERY Macédoine	8	-	-	-	-	-	-	-
Turkey/Turquie	320	-	3	8	1	-	-	2
Ukraine/Ukraine	120	-	-	-	-	-	-	-
United Kingdom/Royaume-Uni	18	-	-	5	-	-	-	-
<b>Total</b>	<b>1497</b>	<b>13</b>	<b>13</b>	<b>28</b>	<b>7</b>			<b>2</b>



## Appendix 3

23 September 2005

(Translated from French)

### INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

#### **Preamble**

The States Parties to this Convention,

*Considering* the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,

*Having regard* to the Universal Declaration of Human Rights,

*Recalling* the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and all other relevant international instruments in the fields of human rights, humanitarian law and international criminal law,

*Recalling* the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992,

*Aware* of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity,

*Determined* to prevent enforced disappearances and combat impunity for the crime of enforced disappearance,

*Considering* the right of any person not to be subjected to an enforced disappearance, the right of victims to justice and to reparation and,

*Affirming* the right to know the truth about circumstances of an enforced disappearance and the fate of the disappeared person, and the respect of the right to freedom to seek, receive and impart information to this end.

*Have agreed* as follows:

**Article 1**

1. No one shall be subjected to enforced disappearance.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

**Article 2**

For the purposes of this Convention, enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

**Article 3**

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

**Article 4**

Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

**Article 5**

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

**Article 6**

1. Each State Party shall take the necessary measures to hold criminally responsible at least:
  - (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;

- (b) The superior who:
  - (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
  - (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
  - (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of the enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.

#### **Article 7**

1. Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish:

(a) Mitigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance;

(b) Without prejudice to other criminal procedures, aggravating circumstances, in particular in the event of the death of the disappeared person or the commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons.

#### **Article 8**

Without prejudice to article 5,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

- (a) Is of long duration and is proportionate to the extreme seriousness of this offence;
- (b) Commences from the moment when the offence of enforced disappearance

ceases, taking into account its continuous nature.

2. Each State Party shall guarantee the right of victims of enforced disappearances to an effective remedy during the term of limitation.

#### **Article 9**

1. Each State Party shall take the necessary measures to establish its jurisdiction over the offence of enforced disappearance:

- (a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is one of its nationals;
- (c) When the disappeared person is one of its nationals and the State Party considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.

#### **Article 10**

1. Upon being satisfied, after an examination of the information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed an offence of enforced disappearance is present shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State Party but may be continued only for such time as is necessary to ensure the person's presence at criminal, surrender or extradition proceedings.

2. A State Party which has taken the measures referred to in paragraph 1 shall immediately carry out a preliminary inquiry or investigations to establish the facts. It shall notify the States Parties referred to in article 9, paragraph 1, of the measures it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances warranting detention, and the findings of its preliminary inquiry or its investigations, indicating whether it intends to exercise its jurisdiction.

3. Any person in custody pursuant to paragraph 1 shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

#### **Article 11**

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.

3. Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.

#### **Article 12**

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where appropriate, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their

defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 shall undertake an investigation, even if there has been no formal complaint.

3. Each State Party shall ensure that the authorities referred to in paragraph 1:

(a) Have the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation;

(b) Have access, if necessary with the prior authorization of a judicial authority, which shall rule promptly on the matter, to any place of detention or any other place where there are reasonable grounds to believe that the disappeared person may be present.

4. Each State Party shall take the necessary measures to prevent and sanction acts that hinder the conduct of the investigations. It shall ensure in particular that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of the investigations by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.

### **Article 13**

1. For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused only on these grounds.

2. The offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of this Convention.

3. States Parties undertake to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently to be concluded between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance.

5. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offence of enforced disappearance as an extraditable offence between themselves.

6. Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, in particular, conditions relating to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions.

7. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, membership of a particular social group or political opinions, or that compliance with the request would cause harm to that person for any one of these reasons.

#### **Article 14**

1. States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.

2. Such legal assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, in particular, the conditions in relation to the grounds upon which the requested State Party may refuse to grant mutual legal assistance or may make it subject to conditions.

#### **Article 15**

States Parties shall cooperate with each other and shall afford one another the greatest measure of assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.

**Article 16**

1. No State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

**Article 17**

1. No one shall be held in secret detention.
2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:
  - (a) Establish the conditions under which orders of deprivation of liberty may be given;
  - (b) Indicate those authorities authorized to order the deprivation of liberty;
  - (c) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;
  - (d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;
  - (e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with the prior authorisation of a judicial authority ;
  - (f) Guarantee that any person deprived of liberty and, in the case of a suspected enforced disappearance, the person deprived of liberty not being able to exercise this right, that any person with a legitimate interest, such as relatives of the person deprived of liberty, their representative or their counsel, in all circumstances, shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the deprivation of liberty and order the release if that deprivation of liberty is not lawful.

3. Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:

- (a) The identity of the person deprived of liberty;
- (b) The date, time and location where the person was deprived of liberty and the identity of the authority who deprived the person of liberty;
- (c) The authority having decided the deprivation of liberty and the reasons for the deprivation of liberty;
- (d) The authority controlling the deprivation of liberty;
- (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
- (f) Elements regarding the physical integrity of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains;
- (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

#### **Article 18**

1. Without prejudice to articles 19 and 20, each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representative or their counsel, access to at least the following information:

- (a) The authority having decided the deprivation of liberty;
- (b) The date, time and location where the person was deprived of liberty and admitted to the place of deprivation of liberty;
- (c) The authority controlling the deprivation of liberty;
- (d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
- (e) The date, time and place of release;

- (f) Elements regarding the physical integrity of the person deprived of liberty;
  - (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the human remains.
2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

**Article 19**

1. Personal information, including medical and genetic data, which are collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation.
2. The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.

**Article 20**

1. Only when a person is under the protection of the law and the deprivation of liberty is subject to judicial control, can the right to information referred to in Article 18 be restricted and only on an exceptional basis, where strictly necessary and provided for by law, and if the transmission of the information would undermine the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions to the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.
2. Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1 the right to a prompt and effective judicial remedy as a means of obtaining without delay information

referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.

**Article 21**

Each State Party shall take the necessary measures to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released. Each State Party shall also take the necessary measures to assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release, without prejudice to any obligations to which such persons may be subject under national law.

**Article 22**

Without prejudice to article 6, each State Party shall take the necessary measures to prevent and impose sanctions for the following conduct:

- (a) Delaying or obstructing the remedies referred to in article 17, paragraph 2 (f), and article 20, paragraph 2;
- (b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register and/or records knew or should have known to be inaccurate;
- (c) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.

**Article 23**

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to:

- (a) Prevent the involvement of such officials in enforced disappearances;
- (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances;
- (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized.

2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished.

3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or organs vested with reviewing or remedial powers.

#### **Article 24**

1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as a direct result of an enforced disappearance.

2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

5. The right to obtain reparation referred to in paragraph 4 covers material and psychological harm and, where appropriate, other means of reparation such as:

- (a) Restitution;
- (b) Rehabilitation;
- (c) Satisfaction, including restoration of dignity and reputation;
- (d) Guarantees of non-repetition.

6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of the disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with contributing to the establishment of the circumstances of

enforced disappearances and the fate of disappeared persons, and with assistance to victims of enforced disappearance.

#### **Article 25**

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

(a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;

(b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a).

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.

3. States Parties shall assist one another in searching for, identifying and locating the children referred to in paragraph 1 (a).

4. Given the need to protect the best interests of the children referred to in paragraph 1 (a) and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that stemmed from an enforced disappearance.

5. In all cases, and in particular in all matters relating to this article, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

#### **Article 26**

1. A Committee on Enforced Disappearances (hereafter referred to as the Committee) shall be established to carry out the functions provided for under this Convention. The Committee shall consist of 10 experts of high moral character and recognised competence in the field of human rights, who shall serve in their personal capacity and be independent and impartial. The

members of the Committee shall be elected by the States Parties according to equitable geographical distribution. Consideration shall be given to the usefulness of the participation to the work of the Committee of persons having relevant legal experience and to balanced gender representation.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties from among their nationals, at biennial meetings of States Parties convened by the Secretary General of the United Nations for this purpose. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of votes of the representatives of States Parties present and voting.

3. The initial election shall be held no later than six months after the date of entry into force of this Convention. At least four months before the date of each election, the Secretary General of the United Nations shall address a letter to the States Parties inviting them to submit the nominations within three months. The Secretary General shall prepare a list in alphabetical order of all persons thus nominated, indicating the State Party which nominated each candidate. He/She shall submit this list to all States Parties.

4. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 2 of this article.

5. If a member of the Committee dies or resigns or for any other cause can no longer perform his/her committee duties, the State Party which nominated him/her shall, in accordance with the criteria set out in paragraph 1 of this article, appoint another candidate from among its nationals, to serve for the remainder of his/her term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half or more of the States Parties respond negatively within six weeks after having been informed by the Secretary General of the United Nations of the proposed appointment.

6. The Committee shall establish its own rules of procedure.

7. The Secretary General of the United Nations shall provide the necessary means, staff and facilities for the effective performance of the functions of the Committee. The Secretary General of the United Nations shall convene the initial meeting of the Committee.

8. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

9. Each State Party shall co-operate with the Committee and assist its members in the fulfilment of their mandate, to the extent of the Committee's functions that the State Party has accepted.

#### **Article 27**

A Conference of States Parties will take place at the earliest four years and at the latest six years following the entry into force of this Convention to evaluate the functioning of the Committee and to decide, in accordance with the procedure described in article 44, paragraph 2, whether it is appropriate to transfer to another body – without excluding any possibility - the monitoring of this Convention, in accordance with the functions defined in articles 28 to 36.

#### **Article 28**

1. In the framework of the competencies granted by this Convention, the Committee shall co-operate with all relevant organs, offices and specialized agencies and funds of the United Nations, with the treaty bodies instituted by international instruments, with the special procedures of the United Nations, and with the regional intergovernmental organizations or bodies concerned, as well as with all relevant State institutions, agencies or offices working toward the protection of all persons against enforced disappearances.

2. As it discharges its mandate, the Committee shall consult other treaty bodies instituted by relevant international human rights instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political Rights, with a view to ensuring the consistency of their respective observations and recommendations.

#### **Article 29**

1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a report on the measures taken to give effect to its obligations under this Convention, within two years after the entry into force of this Convention for the State Party concerned.

2. The Secretary-General of the United Nations shall make this report available to all States Parties.
3. Each report shall be considered by the Committee, which shall issue such comments, observations or recommendations as it may deem appropriate. The comments, observations or recommendations shall be communicated to the State Party concerned, which may respond to them, on its own initiative or at the request of the Committee.
4. The Committee may also request further information from State Parties relevant to the implementation of this Convention.

**Article 30**

1. A request that a disappeared person should be sought and found on an urgent basis may be submitted to the Committee by relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any other person having a legitimate interest.

2. If the Committee considers that the request for urgent action submitted in pursuance of paragraph 1:

- (a) Is not manifestly unfounded;
- (b) Does not constitute an abuse of the right of submission of such requests;
- (c) Has already been duly presented to the competent bodies of the State Party concerned, such as investigative authorities, when this possibility exists;
- (d) Is not incompatible with the provisions of this Convention; and
- (e) The same matter is not being examined under another procedure of international investigation or settlement of the same nature;

it shall request the State Party concerned to provide it with information on the situation of the person concerned, within a time limit set by the Committee.

3. In the light of the information provided by the State Party concerned in accordance with paragraph 2, the Committee may transmit recommendations to the State Party including a request that the State Party take all appropriate measures, including interim measures, to locate and protect the person in accordance with this Convention and inform the Committee within a specified period of time, of measures taken, taking into account the urgency of the situation. The Committee shall inform the person submitting the urgent action request of its recommendations and of the information provided to it by the State as it becomes available.

4. The Committee shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved. The person presenting the request shall be kept informed.

### **Article 31**

1. A State Party may at the time of ratification or at any time afterwards declare that it recognises the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of the provisions of this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. The Committee shall consider a communication inadmissible when:

- (a) The communication is anonymous;
- (b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of this Convention;
- (c) The same matter is being examined under another procedure of international investigation or settlement; or when
- (d) All effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged.

3. If the Committee considers that the communication meets the requirements set out in paragraph 2, it shall transmit the communication to the State Party concerned, requesting it to provide observations and comments within a time limit set by the Committee

4. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation. Where the Committee exercises its discretion, this does not imply a determination on admissibility or on the merits of the communication.

5. The Committee shall hold closed meetings when examining communications under the present article. It shall inform the author of the communication of the responses provided by the State Party concerned. When the Committee decides to terminate the procedure it shall communicate its views to the State Party and to the author of the communication.

**Article 32**

1. If the Committee receives reliable information indicating grave violations by a State Party of this Convention, it may, after consultation with the State Party concerned, request one or more of its members to undertake a visit and report back to it without delay.
2. The Committee shall notify the State Party concerned in writing of its intention to organise a visit, indicating the composition of the delegation and the purpose of the visit. The State Party shall answer the Committee within a reasonable time.
3. Upon a substantiated request by the State Party, the Committee may decide to postpone or cancel its visit.
4. If the State Party agrees to the visit, the Committee and the State Party concerned shall work together to define the modalities of the visit and the State Party shall provide the Committee with all the facilities needed for the successful completion of the visit.
5. Following its visit, the Committee shall communicate to the State Party concerned its observations and recommendations.

**Article 33**

A State Party to this Convention may at any time declare that it recognises the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. The Committee shall not receive communications concerning a State Party which has not made such a declaration, nor communications from a State Party which has not made such a declaration.

**Article 34**

If the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State Party, it may, after seeking from the State Party concerned all relevant information on the situation, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary General of the United Nations.

**Article 35**

1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.
2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned.

**Article 36**

1. The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.
2. Before an observation on a State Party is published in the annual report, the State Party concerned shall be informed in advance and shall be given reasonable time to answer. This State Party may request the publication of its comments or observations in the report.

**Article 37**

Nothing in this Convention shall affect any provisions which are more conducive to the protection of all persons from enforced disappearance and which may be contained in :

- a) the law of a State Party;
- b) International law in force for that State.

**Article 38**

1. This Convention is open for signature by all Member States of the United Nations Organisation.
2. This Convention is subject to ratification by all Member States of the United Nations Organisation. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. This Convention is open to accession by all Member States of the United Nations Organisation. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

**Article 39**

1. This Convention shall enter into force on the thirtieth day after the date of deposit of the twentieth instrument of ratification or accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twentieth instrument of ratification or accession, this Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or accession.

**Article 40**

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

- (a) Signatures, ratifications and accessions under article 38;
- (b) The date of entry into force of this Convention under article 39.

**Article 41**

The provisions of this Convention shall extend to all parts of federal States without any limitations or exceptions.

**Article 42**

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation or by the procedures expressly provided for in this Convention shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organisation of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.
2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a declaration.
3. Any State Party having made a declaration in accordance with paragraph 2 of this article may at any time withdraw this declaration by notification to the Secretary-General of the United Nations.

**Article 43**

This Convention is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the additional protocols thereto of 8 June 1977, or to the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

**Article 44**

1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties to this Convention with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations.
2. Any amendment adopted by a majority of two thirds of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.
3. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have accepted it in accordance with their respective constitutional processes.
4. When amendments enter into force, they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of this Convention and any earlier amendment which they have accepted.

**Article 45**

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.



## Publications List

*Other materials available from the Kurdish Human Rights Project include:*

- A Fearful Land: Fact-Finding Mission to Southeast Turkey (1996)
- A Delegation to Investigate the Alleged Used of Napalm or Other Chemical Weapons in Southeast Turkey (1993)
- Advocacy and the Rule of Law in Turkey (1995)
- After the War: Fact-Finding Mission to Iraqi Kurdistan (2003)
- *Akduvar v. Turkey* - The Story of Kurdish Villagers Seeking Justice in Europe (1996)
- *Aksoy v. Turkey & Aydin v. Turkey*: Case reports on the practice of torture in Turkey -volume I (1997)
- *Aksoy v. Turkey & Aydin v. Turkey*: Case reports on the practice of torture in Turkey - volume II. (1997)
- Azerbaijan and Armenia – An Update on Ethnic Minorities and Human Rights by Deborah Russo and Kerim Yildiz (2000)
- Baku-Tbilisi-Ceyhan Oil Pipeline: Human Rights, Social and Environmental Impacts - Turkey Section Final Report of Fourth Fact-Finding Mission (2004)
- Baku-Tbilisi-Ceyhan Oil Pipeline: Human Rights, Social and Environmental Impacts - Turkey Section Final Report of Fifth Fact-Finding Mission (2006)
- Baku-Tbilisi-Ceyhan Oil Pipeline: Human Rights, Social and Environmental Impacts – Georgia Section Final Report of Fact Finding Mission (2006)
- Cases Against Turkey Declared Inadmissible by the European Commission of Human Rights Volume 1 (1998).
- Censorship and the Rule of Law: Violations of Press and Attacks on *Özgür Gündem* (1994)
- Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora (2004)
- Charter for the Rights and Freedoms of Women in the Kurdish Regions and Diaspora - English, Sorani, Kurmanci, Arabic, Turkish, French (Second Edition) (2004)
- Cultural and Language Rights of Kurds: A Study of the Treatment of Minorities under National Law in Turkey, Iraq Iran and Syria (1997)

- Damning Indictment: How the Yusufeli Dam Violates International Standards and People's Rights (2002)
- Denial of a Language: Kurdish Language Rights in Turkey – Fact-Finding Mission Report (2002)
- Development in Syria – A Gender and Minority Perspective (2005)
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**“Over the past decade the BHRC has had great pleasure in working with the KHRP. No organisation has had more impact both in Strasbourg at the European Court of Human Rights, and in Turkey’s political-legal configuration. The BHRC is proud of its close association with the KHRP.”**

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**Jonathan Sugden, *Turkey Researcher***

**“In my opinion, for a view on the KHRP one should ask the ancient cities it has saved from submersion, the villagers it has represented whose houses had been burnt and destroyed, prisoners of conscience and those who had been tortured, for they know the KHRP better.”**

**Can Dundar, *Journalist in Turkey***

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